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CITIZENSHIP & SEVERITY: RECENT IMMIGRATION REFORMS AND THE NEW PENOLOGY

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I. INTRODUCTION

Over the past twenty years, scholars of criminal law, criminology and criminal punishment have documented a transformation in the practices, objectives, and institutional arrangements underlying a range of criminal justice system functions that are at the heart of penal modernism.¹ In contrast to the preceding eighty years of criminal justice practices that were progressively more modern in their belief in the rationality of the criminal offender and their concern for enhancing civilization through rehabilitative responses to criminality, these scholars note that since the mid-1980's the relatively settled assumptions about the framework that shaped criminal justice and penal practices for nearly a decade were abruptly thrown into reverse.

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1. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001) 53-73; James E. Robertson, *Houses of the Dead: Warehouse Prisons, Paradigm Change, and the Supreme Court*, 34 *HOUS. L. REV.* 1003 (1997); James E. Robertson, *The Decline of Negative Implication Jurisprudence: Procedural Fairness in Prison Discipline After Sandin v. Conner*, 32 *TULSA L.J.* 39 (1996); ELLIOTT CURRIE, *CRIME AND PUNISHMENT IN AMERICA* (1998); FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* (1995); FRANKLIN E. ZIMRING ET AL., *PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA* (2001); FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* (1991); Leena Kurki & Norval Morris, *The Purposes, Practices, and Problems of Supermax Prisons*, 28 *CRIME & JUST.* 385 (2001); R.A. DUFF & DAVID GARLAND (eds.), *A READER ON PUNISHMENT* (1994); MARC MAUER, *RACE TO INCARCERATE* (1999); MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA* (1995); TARA HERIVAL & PAUL WRIGHT, *PRISON NATION: THE WAREHOUSING OF AMERICA'S POOR* (2003); DAVID GARLAND (ed.), *MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES* (2001); MICHAEL WELCH, *PUNISHMENT IN AMERICA: SOCIAL CONTROL AND THE IRONIES OF IMPRISONMENT* (1999).

The introduction to David Garland's latest book, *The Culture of Control*, describes how this transformation manifested itself within the criminal justice system, including its impact on career criminal justice professionals.

Within the brief time it takes to progress from basic training to mid-career, a whole generation of practitioners – probation officers, prison officials, prosecutors, judges, police officers, and criminological researchers – have looked on while their professional world was turned upside down. Hierarchies shifted precariously; settled routines were pulled apart; objectives and priorities were reformulated; standard working practices were altered; and professional expertise was subjected to challenge and viewed with increasing skepticism. The rapid emergence of new ways of thinking and acting on crime, and the concomitant discrediting of older assumptions and professional orientations, ensured that many penal practitioners and academics lived through the 1980's and 1990's with a chronic sense of crisis, and professional anomie.²

Immigration practitioners are currently reeling from changes that have occurred in immigration law and administrative practices that dramatically undermine practices and objectives that characterized the field as recently as twenty years ago.³ Major shifts in policy generated by federal immigration reform legislation have likewise created a sense of crisis that pervades the practice of immigration law. The uncertainty produced by sweeping reform legislation enacted at a rapid pace has confounded attorneys and judges alike as they struggle to discern applicable legal standards and procedures with a backlog of cases requiring their urgent attention.⁴ Likewise, the Homeland Security Act of 2002,⁵ which restructured many government agencies and subsumed the Immigration and Naturalization Service, left career immigration officials unsure of the nature and continuity of their employment, and

2. DAVID GARLAND, *THE CULTURE OF CONTROL* 4 (2001).

3. The law and practices that were operative twenty years ago were themselves aberrations in a centuries-long tradition of harshness toward immigrants that included indefinite detention, summary exclusion, and discrimination. The changes that have occurred through recent immigration reforms can be viewed, therefore, as disrupting practices and objectives that stand out against an exception to a broader background of harsher practices. Nevertheless, recent immigration reforms have reversed much of the progress these exceptional practices established in the 1950's, 1960's and 1970's, when it appeared (at least to some scholars) that immigration law was being permanently realigned to comport with the constitutional doctrine of the Warren Court and civil rights legislation.

4. Neil A. Lewis, *With Immigration Law in Effect, Battles Go On*, N.Y. TIMES, Apr. 2, 1997, at A10 (reporting widespread confusion and anxiety among immigration officials and immigrant families alike); Linda Greenhouse, *Justices Uphold Selective Deporting of Aliens*, N.Y. TIMES, Feb. 25, 1999, at A22 (reporting "widespread confusion over how to interpret the densely worded, internally contradictory provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996").

5. Pub. L. No. 107-296, 116 Stat. 2135 (2002).

under whose authority their administrative units would function.⁶ The instability and uncertainty produced by hastily enacted immigration legislation in the 1980's and 1990's occasioned crises for immigration practitioners and immigrants.⁷ However, these reforms were themselves a response to a sense of crisis that America's borders were out-of-control and its existing immigration policies were ineffectual and unenforceable.⁸

As immigration reforms increasingly enhance the role of law enforcement and incorporate criminal penalties, the regulation of non-U.S. citizens—particularly those with criminal convictions in their pasts—has become intimately involved in crime control. Immigration control is increasingly adopting the practices and priorities of the criminal justice system. Many scholars and commentators are describing this unprecedented intimacy as the “criminalization of immigration law.” It has motivated immigration scholars to document harsh, law enforcement-focused reforms in the treatment of non-U.S. citizens and the impact of these reforms on immigration procedures and practices.⁹ This scholarship largely documents the reforms and their consequences in much the same way as crime scholars initially focused on documenting the fact that a shift in the balance of crime legislation of great significance had occurred. Although the horrific events of September 11, 2001 immediately produced an urgent new agenda for controlling crime within immigration law, the reasons underlying such heavy reliance upon punitiveness within immigration reforms of the 1980's and 1990's are hardly self-evident.

This paper seeks to clarify why these reforms are taking place, why they are taking place at this historical juncture, and why they rely heavily on criminal punitiveness by drawing upon the new penological literature that

6. Tim Weiner, *Along Borders, Tension and Uncertainty Prevail*, N.Y. TIMES, Mar. 1, 2003, at A11 (describing tension and confusion among customs officials caused by restructuring of INS). The internal confusion caused by the elimination of the INS has also confused immigration officials in other countries. Soon after the breakup of the INS, and the dispersion of its functions across three different divisions of the Department of Homeland Security, the lines of communication between foreign immigration officials were reportedly in disarray. Mike Allen, *Former INS Head Warns of Rights Abuses*, WASH. POST, June 15, 2003, at A12.

7. Jim Specht, *Panic Spreads as Immigration Deadline Nears*, USA TODAY, Mar. 31, 1997, at 3A (reporting the chaos and panic created by 1996 immigration reforms on the eve of their taking effect).

8. Described by one author as a “beleaguered bureaucracy,” the immigration system came under heavy public criticism in the 1980's and 1990's for a host of inadequacies including lax law enforcement, a fragmented administrative structure and an absence of clear objectives. These inadequacies permitted illegal immigration to the level of a large-scale crisis. Immigration reforms adopted in the 1980's and 1990's were an attempt to ameliorate the crisis. MILTON D. MORRIS, *IMMIGRATION: THE BELEAGUERED BUREAUCRACY* 88-93 (1985).

9. Robert Bach, *The Progress of Immigration Reform*, in 21 IN DEFENSE OF THE ALIEN 7-18 (Lydio Tomasi ed., 1999); Iris Bennett, *The Unconstitutionality of Nonuniform Immigration Consequences of ‘Aggravated Felony’ Convictions*, 74 N.Y.U. L. REV. 1696 (1999); Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411 (1997); Victoria C. Capitaine, *Life in Prison Without a Trial: the Indefinite Detention of Immigrants in the United States*, 79 TEX. L. REV. 769 (2001); Daniel Kanstroom, *Deportation and Justice: A Constitutional Dialogue*, 41 B.C. L. REV. 771 (2000); Peter H. Schuck, *INS Detention and Removal: A ‘White Paper’*, 11 GEO. IMMIGR. L. J. 667 (1997).

seeks to explain the broader significance of changes in crime control strategies and practices over the past three decades. In doing so, this paper will clarify the relationship between recent, harsh immigration reforms adopted both pre- and post-9/11 and the severity revolution within crime control that has been documented by crime scholars.

II. THE CHANGING LANDSCAPE OF IMMIGRATION CONTROL

In the past two decades, several profound shifts have occurred in the treatment of immigrants as a result of a perceived “crisis” in immigration policy that began in the late 1970’s and early 1980’s. A number of developments in immigration law and policy attest to a changing landscape of immigration control. First, we have moved from an era in which courts and Congress showed a willingness to afford non-U.S. citizens limited procedural and substantive rights to an era in which the rights of non-citizens have been sharply curtailed. Rights that have been abdicated by recent legislation include the right to judicial review of discretionary decisions regarding detention or release,¹⁰ the right to judicial review of a deportation order against any non-citizen with a criminal conviction for an “aggravated felony” in his past,¹¹ and the right to a stay of deportation pending appeal.¹²

Second, legal and political tolerance of illegal aliens, including the willingness to afford them welfare benefits to nominally prevent them from devolving into a permanent underclass, has given way to a belief that criminal punishment and expedited removal of illegal aliens through beefed up law enforcement is the best way to handle illegal immigration.

Third, criminal grounds for deporting non-citizens that were previously quite limited and enforced with laxity have been greatly expanded in scope and are now strictly enforced through a variety of mechanisms and institutional arrangements that have produced unprecedented cooperation between criminal and immigration law enforcement. Thus, immigration detention—

10. Through the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) and the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRAIRA”), Congress attempted to “strip” the federal courts of the authority to review virtually all immigration decisions, including deportation and detention orders, by the Attorney General or any of its delegates, including immigration judges. However, the Supreme Court has repeatedly affirmed the habeas corpus jurisdiction of the federal courts to review constitutional claims and pure questions of law. *See* *Felker v. Turpin*, 518 U.S. 651 (1996); *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001); *Zadvydas v. Davis*, 533 U.S. 678 (2001).

11. Congress eliminated federal court review of deportation orders against aggravated felons in IIRAIRA. However, the federal courts retain habeas corpus jurisdiction over constitutional claims and questions of law, *St. Cyr*, 533 U.S. 289, and circuit courts retain jurisdiction to review determinations of whether someone was properly deported as an aggravated felon, *Xiong v. INS*, 173 F.3d 601 (7th Cir. 1999).

12. Prior to the enactment of the IIRAIRA, the filing of a petition for judicial review in the court of appeals automatically stayed an order of deportation (INA § 106(a)(3)). Under the IIRAIRA, the filing of a petition for review under INA § 242(a)(1) does not automatically stay execution of the government’s removal order unless the court directs otherwise. AUSTIN FRAGOMEN ET AL., IMMIGRATION LEGISLATION HANDBOOK, § 1:68 I-135 (2002).

previously reserved for the more dangerous individuals to assure their appearance at the time and place of deportation—is now *so* broadly applied to excludable and deportable aliens that it no longer serves to incapacitate the most dangerous individuals, but to punish most deportable aliens by confining them in institutions such as county jails, federal lockups and immigration service detention facilities.¹³ In turn, the exponential growth of the Immigration and Naturalization Service (“INS”) detained population in excess of available beds in INS-supervised facilities has increased the participation of public and private actors in the detention of immigration detainees, resulting in the commodification of immigration detainees.¹⁴

Fourth, we have moved from an era in which cooperation between the INS and local and state law enforcement was eschewed to an era in which local and state police involvement in enforcing “civil” immigration orders is embraced. Traditionally, such involvement was undesirable for its tendency to discourage illegal aliens or non-citizens from mixed-status families from reporting crimes in their communities as well as their own victimization.¹⁵

Fifth, immigration—seen primarily as a civil rights issue during the Civil Rights Era spanning the 1960’s and 1970’s¹⁶—is now seen as a critical issue of national security.¹⁷ Immigration law enforcement was once constrained by the political will to protect refugees and undocumented workers who were seen as victims of flawed, often racially discriminatory immigration practices. The American Public now represents the primary victim of flawed immigration practices; a victim in need of protection from immigrants draining welfare coffers and failing to culturally assimilate into the white middle-class. Most recently, the public has been victimized by a religiously and ethnically constituted group of Muslim and Arab men. As a result, law enforcement tactics such as racial profiling and preventive detention that would have shocked the nation twenty years ago are tolerated and even condoned as a “necessary evil” for the protection of national security.

13. The INS, whose functions were subsumed by the Department of Homeland Security, houses its detainees in the following types of facilities: its own Service Processing Centers, Federal Bureau of Prisons facilities, state and local jails, and other contract facilities.

14. Michael Welch, *The Role of the Immigration and Naturalization Service in the Prison-Industrial Complex*, 27 SOC. JUST. 73 (2000).

15. Additionally, such interagency cooperation—particularly where immigration authority is delegated to local law enforcement—raises concerns about abuses of power such as police profiling and harassment of people in border areas who “appear” to be foreign-born, and the inappropriate use of deportation to make an “end run” around the constitutional protections inherent in the process of criminal prosecution. Bach, *supra* note 9.

16. DEBRA DeLAET, U.S. IMMIGRATION POLICY IN AN AGE OF RIGHTS 1 (2000) (“Civil rights have been a central part of the discourse shaping the debate over U.S. immigration policy since at least the 1960’s. . . [S]ince the 1960’s, the idea that fairness and non-discrimination should fundamentally shape U.S. immigration policy has predominated in the immigration policy debate in this country.”).

17. Christopher Drew & Adam Liptak, *Immigration Groups Fault Rule on Automatic Detention of Some Asylum Seekers*, N.Y. TIMES, Mar. 31, 2003, at B15 (citing harsh policy of automatically detaining asylum seekers from Muslim countries as evidence that immigration is being treated more as an issue of national security than as a social and demographic issue).

III. LEGAL LANDSCAPE OF THE CRIMINALIZATION OF IMMIGRATION LAW

A. *The Criminalization of Immigration Law*

The phrase “criminalization of immigration law” has been employed by practitioners and scholars alike to describe many different aspects of the shift toward greater criminal punitiveness that has emerged within the past two decades; most dramatically since the enactment of harsh federal immigration reforms in 1996. In *Zero Tolerance: The Increasing Criminalization of Immigration Law*,¹⁸ practitioner Helen Morris cites the increased prosecution of immigration violations as federal crimes since the mid-1980’s (and the resulting increase in incarceration of non-citizens for what historically were civil violations) as well as the harsh immigration consequences for other, often minor, criminal activity as evidence of the increasing criminalization of immigration law. In *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*,¹⁹ Professor Maria Isabel Medina analyzes the use of new criminal penalties under the Immigration Reform and Control Act of 1986 (“IRCA”) and the Immigration Marriage Fraud Act of 1986 (“IMFA”) to discourage and prevent citizens from either assisting aliens to enter the United States, or from assisting aliens who have already entered the country to become permanent residents. She asserts that by criminalizing the employment-based and marital relationships of undocumented persons, the United States is increasingly looking to the criminal law to address the problem of illegal immigration. In *A New Look at Deportation as Punishment: Why at Least Some of the Constitution’s Criminal Procedure Protections Must Apply*,²⁰ immigration attorney Robert Pauw criticizes the harsh immigration consequence of deportation for a past criminal conviction and the fiction that deportation is “civil” in nature as obscuring the criminalization of immigration law. He argues that in some cases the statutory framework of immigration law is inherently penal, citing the example of a person convicted of an “aggravated felony” who is deportable without any possibility of a waiver, even in the most compelling of circumstances. In *The Immigrant as Criminal: Punishing Dreamers*,²¹ Professor Bill Ong Hing describes the process by which undocumented workers are simultaneously lured to the United States, then problematized, demonized, dehumanized, and ultimately criminalized in a manner that “renders punishment of aliens a

18. Helen Morris, *Zero Tolerance: The Increasing Criminalization of Immigration Law*, 74 INTERPRETER RELEASES 1317, No. 33 (Aug. 29, 1997).

19. Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669 (1997).

20. Robert Pauw, *A New Look at Deportation as Punishment: Why At Least Some of the Constitution’s Criminal Procedure Protections Must Apply*, 5 BENDER’S IMM. BULL. 475, No. 11 (June 1, 2000).

21. Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 HASTINGS WOMEN’S L.J. 79 (1998).

part of the American psyche.” Professor Hing draws upon the history of immigration law in the United States, but particularly upon reforms within the past two decades in asserting that immigrants who dare to pursue the dream that life in the United States represents are treated as criminals even within the nominally civil immigration system when they are jailed, guarded and deprived of counsel. While he doesn’t specifically employ the term “criminalization,” Professor Daniel Kanstroom argues that a troubling consequence of immigration law reforms of the past fifteen years is “a rather complete convergence between the criminal justice and deportation systems.”²² His article, *Deportation, Social Control and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*,²³ the first in a trilogy of articles on the state of US deportation law, observes that the purposes served by the deportation of some long-term resident aliens conform to the functions served by criminal punishment—incapacitation, deterrence and retribution. From this observation, Kanstroom goes on to question the long-held assumption that the harsh consequence of deportation for some long-term resident aliens merely constitutes “regulation,” rather than punishment, within a nominally civil deportation system.

Other immigration reforms within the past two decades that have been cited as evidence of the increasing criminalization of immigration law include the new policy of detaining and criminally prosecuting asylum-seekers entering the United States with false documents,²⁴ cooperative efforts between state law enforcement departments and immigration officials,²⁵ and stiff criminal penalties (in addition to deportation) such as incarceration, heavy fines and forfeiture of property for the act of entry itself, and for fraud in a variety of contexts.²⁶

The phrase “criminalization of immigration law” has become a general way of describing the closer relationship that has developed between immigration law and criminal law, although as the preceding paragraphs illustrate, it means different things to different people. While immigration scholars use it to account for a number of recent changes within immigration law, the phrase tends to emphasize overall the importation of

22. Daniel Kanstroom, *Deportation, Social Control, and Punishment*, 113 HARV. L. REV. 1889, 1891 (2000).

23. *Id.*

24. Stanley Mailman & Stephen Yale-Loehr, *Detaining and Criminalizing Asylum Seekers*, 8 IMM. BULL. 764, No. 9 (May 1, 2003) [hereinafter Mailman].

25. See DOJ Legal Opinion Would Broaden Use of State, Local Personnel in Immigration Enforcement, 79 INTERPRETER RELEASES 519 (2002); Cheryl W. Thompson, *INS Role for Police Considered*, WASH. POST, Apr. 4, 2002, at A15; Susan Sachs, *A Nation Challenged: Illegal Immigrants: Long Resistant, Police Start Embracing Immigration Duties*, N.Y. TIMES, Mar. 15, 2002, at A11; *INS Signs Agreement with Florida to Authorize State, Local Officers to Perform Immigration Enforcement*, 79 INTERPRETER RELEASES 1120, No. 30 (July 29, 2002); *INS Issues Final Rule Authorizing State, Local Immigration Enforcement During ‘Mass Influx’ of Aliens*, 79 INTERPRETER RELEASES 1113.

26. Medina, *supra* note 19, at 675-76.

criminal categories, processes and techniques into the regulation of immigrants. However, from the perspective of crime scholars who tend to view the burgeoning correctional population of non-U.S. citizens, the increased criminal prosecution of immigration violations, and other punitive immigration reforms as expanding the authority of the criminal justice system, and simultaneously distorting its traditionally adjudicative function into something more like an administrative police state, the phrase "criminalization of immigration law" is inadequate. It does not reflect the interjection of the regulatory, administrative (and inherently more discretionary) practices of immigration control into the criminal justice system—the "immigrationization of criminal law," if you will. Nor does it reflect the linkage of informal (or symbolic) citizenship rights to a person's criminal history.²⁷ In sum, the "criminalization" of immigration law fails to capture the dynamic process by which both systems converge at points to create a new system of social control that draws from both immigration and criminal justice, but it is purely neither.

The work of Jonathan Simon and other proponents of the "new penology" describe this process as "governing through crime."²⁸ Derived from the work of Michel Foucault, Simon's theory is that "crime and punishment have become the occasions and institutional contexts" for shaping the conduct of others.²⁹ In other words, we are governed through crime whenever crime and its punishment become the occasion or the opportunity for exercising power over others.³⁰ Governing through crime characterizes the recent trend to increasingly construe problems of regulation as problems of crime, and in doing so, makes available a whole host of tools and techniques of criminal punishment that would otherwise be inappropriate and unavailable. Thus, the increasing salience of crime as a rationale for harsher, more punitive treatment of immigrants demonstrates how non-U.S. citizens are being governed through crime.

27. Increasingly, criminals and ex-offenders are facing penalties collateral to their criminal arrests or convictions that impose barriers to their successful reentry into society. These barriers uniquely parallel the barriers traditionally faced by individuals who illegally enter the US: ineligibility to vote or hold political office; ineligibility to obtain certain forms of employment. Like illegal aliens, a pervasive fear of their criminal history being disclosed makes these ex-convicts subject to abuse and exploitation. Indeed, it creates a subclass of rightless persons, the very problem that has prompted immigration reforms affording social welfare benefits to illegal immigrants in the 1980's. "There are people within this country who cannot vote, who cannot hold political office, who are constantly in fear of a knock on the door, even though that knock may never come, who are in fear of being stopped on the street, who are in fear of any contact with government officers, who are abused, taken advantage of, whose rights can be violated on the job, who can be discriminated against in one way or another. It's just not a healthy thing to have a subclass of that kind in this country." RICHARD D. LAMM & GARY IMHOFF, *THE IMMIGRATION TIME BOMB* 45 (1985) (quoting Vernon Briggs).

28. Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 *LAW & SOC. INQUIRY* 1111 (2000).

29. Jonathan Simon, *Governing Through Crime*, in *THE CRIME CONUNDRUM: ESSAYS IN JUSTICE* (L. Friedman & G. Fischer eds., 1997).

30. *Id.* at 5.

Two related changes in immigration law that emerged within the past two decades demonstrate how immigrants are being increasingly governed through crime: (1) greater criminal punitiveness within a nominally civil system of immigration regulation, and (2) greater criminal consequences for immigration violations, many of which were previously treated civilly. Despite the early emphasis on selectively controlling the influx of foreigners with criminal backgrounds,³¹ not until quite recently have immigration and criminal laws interacted so extensively to accomplish this. While foreign-born individuals have long been subject to dual sanctions under immigration law as a result of prior criminal activity or disposition within the criminal justice system,³² over the past twenty years there has been an unprecedented growth in the scope of criminal grounds for the exclusion and deportation of foreign-born non-U.S. citizens,³³ as well as immigration crimes themselves.³⁴ In other words, the harsh *immigration consequences of criminal activity* such as exclusion and deportation have been expanded, as have the *criminal consequences of immigration violations* (many of which were formerly treated civilly). Today more than twenty-five separate sections of the Immigration and Naturalization Act specifically proscribe conduct that is associated with criminal activity or expressly made criminal by statute.³⁵

The priority accorded crime control within immigration law sharply contrasts with the manner in which legal and illegal immigrants were regulated just twenty years ago. Immigration law historically regulated crime to a degree by excluding immigrants with criminal records³⁶ and deporting legal entrants who commit crimes soon after admission.³⁷ However, the degree to which non-citizens have been detained and expelled for criminal histories since 1988 — without regard to the remoteness of the conviction, the seriousness of the crime, the length of the alien's residence in the United States or the hardship imposed upon their families — is unprecedented. So is

31. NATIONAL LAWYERS GUILD, IMMIGRATION AND CRIMES 1-1 (2002) ("Immigration laws have consistently imposed harsh sanctions on foreign-born persons who are convicted of crimes associated with criminal activity. In fact, one of the primary motivations underlying the development of selective immigration controls was the exclusion of criminals. Many provisions contained in the immigration statute were enacted precisely to exclude or expel foreign-born persons considered to be undesirable residents of the United States as a result of their criminal activity.").

32. *Id.* at 1-2 ("The critical confluence of [immigration and criminal] laws occurs at the point at which the foreign-born individual becomes subject to dual sanctions on account of his or her involvement with crime or with the criminal justice system.").

33. KESSELBRENNER & ROSENBERG, IMMIGRATION LAW & CRIMES, § 1:6, 1-12, 1-13 (2002) ("Especially since the new 1996 legislation, the INS has been actively pursuing the removal of ever greater numbers of noncitizens convicted of ever more minor offenses, and the number of noncitizens removed on criminal grounds has been doubling every year or two.").

34. *Id.* at § 1-5, 1-11

35. *Id.* at § 1-5, 1-10.

36. Immigration restrictions enacted by Congress in 1882 excluded convicts and persons likely to become public charges. KURZBAN'S SOURCEBOOK ON IMMIGRATION 1 (8th ed.).

37. For example, prior to legislation enacted in 1996, non-citizens legally admitted to the United States were deportable if they committed a crime of moral turpitude within five years of entry. *Id.* at 120.

the degree to which discretion has been removed from immigration judges to provide equitable relief from the harsh effects of detention and expulsion, as well as from federal judges to review the removal and detention decisions of immigration judges.³⁸ Furthermore, the degree to which criminal sanctions and law enforcement techniques are being used to enforce the civil orders of immigration officials is unparalleled, as is the degree to which immigration and criminal law enforcement officials are working cooperatively to regulate immigration.³⁹

B. *Immigration Law During the 1960's, 1970's and Early 1980's*

Any discussion of the shift from broader due process and other substantive rights of non-U.S. citizens in the 1960's, 1970's and early 1980's to more restrictive constructions of immigrants' rights would be premature without some explanation of the role of Congress' expansive power to regulate immigration and the broad discretion of the U.S. Attorney General and his delegates to shape immigration policy and determine the fate of individual aliens facing exclusion, detention, and deportation.

Courts have very limited authority to review federal laws regulating immigration. This is in part a product of Congress' expansive — or plenary — power to regulate immigration. Although the Constitution delineates no power to regulate immigration expressly vested in Congress, long ago the Supreme Court implied Congress' power over immigration.⁴⁰ Congress' plenary power has been expansively interpreted by the Supreme Court to override the claims of individual non-citizens to both procedural and substantive rights. Indeed, the Supreme Court has gone so far as to hold that the measure of the due process rights of a non-citizen seeking to enter the United States is whatever procedure authorized by Congress or its delegates.⁴¹ In

38. See generally, Matthew J. Droskoski, *Criminal Aliens Get Pinched: Sandoval v. Reno, AEDPA's and IIRAIRA's Effect on Habeas Corpus Jurisdiction*, 45 VILL. L. REV. 711 (2000); Gerald L. Neuman, *Habeas Corpus, Executive Detention and the Removal of Aliens*, 98 COLUM. L. REV. 961 (1998); Stephen O. Kline, *Judicial Independence: Rebuffing Congressional Attacks on the Third Branch*, 87 KY. L. J. 679 (1999).

39. See Mailman, *supra* note 24.

40. The Supreme Court has implied Congress' power over immigration by reference to the Naturalization Clause in the Constitution, and to other powers over foreign relations and commerce enumerated to Congress. In one of the earliest immigration cases, *Chae Chan Ping v. United States*, the Supreme Court recognized that the power to exclude non-citizens is inherent in the sovereignty of the United States and that policies established by Congressional legislation cannot be gainsaid by the courts. 130 U.S. 581 (1889). *Chae Chan Ping* was the first in a trilogy of cases in which the Supreme Court rejected constitutional challenges to the deportation and exclusion of noncitizens. See also, *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892) and *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

41. *Nishimura Ekiu*, 142 U.S. at 660 (rejecting procedural due process challenge to the exclusion of a Japanese national because, to noncitizens, "the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law." In the words of the Court, "[i]t is not within the province of the judiciary to order that foreigners who have never been naturalized . . . shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government."); *United States ex rel. Knauff v.*

other words, Congress determines the full extent of such an alien's constitutional rights. These foundational cases — recognizing the exclusive power of the political branches of government to regulate non-citizens — are heavily referenced in even the most current judicial opinions adjudicating the claims of non-citizens subjected to exclusion, deportation, and detention.⁴² Bound by long-standing precedent, the Supreme Court has recognized that it is not within the judicial power to formulate immigration policy, and that any grievances arising out of immigration policy are properly addressed to the political branches of government.⁴³ During a similar period of international and foreign policy crises in which immigration reform legislation was retroactively deporting non-citizens, the Court tracked the language of earlier plenary power cases when it held that it lacked the power to review a resident alien's deportation order. The Court stated that “[r]eform in this field must be entrusted to the branches of the Government in control of our international relations and treaty-making powers.”⁴⁴

What is striking to scholars examining the history of the exclusion, detention, and deportation of immigrants through the lens of penal and criminal law is how little of immigration law is judicially made. In the context of criminal law, appeals to state and federal courts challenging the propriety of police policies and procedures leading to apprehension, detention, and incarceration are commonplace. Likewise, most serious allegations of abuse or misconduct in the treatment of prisoners are, in spite of recent reforms, still judicially reviewable. In contrast, few cases challenging the exclusion, detention or deportation of non-citizens are decided by the judiciary. The plenary power doctrine accounts for this in part.⁴⁵ A competing

Shaughnessy, 338 U.S. 537, 544 (1950) (stating “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned”).

42. For example, *Hall v. I.N.S.* cited the *Chae Chan Ping* case to support the proposition that the United States, as a sovereign nation, has inherent power to exclude and remove non-citizens. 253 F. Supp. 2d 244 (D.R.I. 2003). *Deutsch v. Turner Corp* cited *Chae Chan Ping* in support of the principal that power over immigration and foreign affairs is reserved to the federal government. 317 F.3d 1005 (9th Cir. 2003).

43. *Harisiades v. Shaughnessy*, 342 U.S. 580, 588 (1952).

44. *Id.* at 591.

45. Conversely, it has been suggested that the role of the plenary power doctrine is vastly overstated. In an article entitled *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, immigration scholar Hiroshi Motomura suggested over a decade ago that too much emphasis has been put on the substantive effects of the doctrine (denying aliens of an opportunity to vindicate constitutional claims) rather than the more “fundamental” procedural effects (bridging the gulf between constitutional and subconstitutional immigration law). 100 YALE L.J. 545 (1990). Motomura started with the observation that aliens tend to get more favorable dispositions when judges interpret statutes, regulations and administrative guidelines (subconstitutional immigration law) than when judges apply constitutional norms and principles in considering immigrants’ claims. *Id.* Motomura’s theory is that “phantom” constitutional norms that are not indigenous to immigration law, but that are derived from mainstream public law — like civil rights law — have actually undermined the plenary power doctrine through statutory interpretation. *Id.* Thus, an aberrational relationship between statutory interpretation and constitutional law has developed within immigration law. *Id.* Motomura contends that two sets of constitutional norms have developed within immigration law. *Id.* at 607. And although constitutional immigration law remains formally tethered to the plenary power doctrine through judicial reliance

explanation is that immigration is regulated by a comprehensive and bureaucratic administrative system—like employee benefits or tax law—that insulates all but its most extreme decisions from judicial review.

As the other political branch of the government, the Executive Branch—through the Attorney General (or perhaps now through the Secretary of the Department of Homeland Security)—has great latitude to unilaterally revise immigration regulations and policies. For example, in the days immediately following September 11th, 2001 the executive branch repeatedly invoked this authority. In one instance, the Bush Administration unilaterally expanded its power to detain immigrants without charging them with either criminal or immigration violations. The Attorney General single-handedly rewrote federal immigration regulations to expand from 24 hours to 48 hours the length of time a non-citizen can be detained, and from 48 hours to an unspecified, indefinite length of time during a national emergency.⁴⁶

Although immigration law could, and often did, impose hardships on excludable and deportable aliens, the regime of the 1960's, 1970's and early 1980's was arguably less punitive than it is today. The U.S. economy was robust, rates of migration to the U.S. were far lower and public attitudes toward immigrants were far more welcoming. Immigration law of this period has been characterized as liberal in its willingness to prioritize the natural rights of immigrants;⁴⁷ humanitarian; family-oriented; service-oriented;⁴⁸ even procedurally exuberant.⁴⁹ Indeed, the contrasts are stark, yet to characterize this era as a due process "revolution" overstates the fact. Immigrants, particularly refugees and asylum seekers, enjoyed perhaps the fullest privileges than ever before (or after). Even illegal immigrants were broadly tolerated on a level that was unprecedented in the modern era.

The grounds for deportation of criminal and illegal aliens were narrower, the use of detention was less frequent, avenues for relief from detention were much broader, judicial review of deportation orders was broader, and far fewer immigration violations were criminally punishable. First, non-citizens with criminal convictions in their past were deportable for only a limited category of crimes. For example, for many years prior to 1988, non-citizens with criminal records were subject to deportation primarily for past convictions of crimes of moral turpitude, trafficking in controlled substances or conspiring to do so, and certain automatic weapons offenses. Second, aliens subject to deportation on criminal grounds were subject to detention in a

upon the foundational plenary power cases decided over a century ago, Motomura concludes that the phantom norms that inform the interpretation of immigration statutes undermine the formal plenary power doctrine itself. *Id.* at 549.

46. Philip Shenon & Robin Toner, *A Nation Challenged: Policy and Legislation; U.S. Widens Policy on Detaining Suspects*, N.Y. TIMES, Sept. 19, 2001, at A1.

47. PETER SCHUCK, CITIZENS, STRANGERS AND IN-BETWEENS 50 (1998).

48. See generally Welch, *supra* note 14.

49. David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT L. REV. 165, 171 (1983).

narrow range of circumstances, but were afforded liberal relief from detention on the basis of a wide range of personal considerations, including the age, health and elapsed time of detention; and the likelihood that the alien will resume (or follow) a course of action that would make him deportable.⁵⁰

The long-enduring influence of the plenary power doctrine ultimately limited the success of non-citizens ordered deported or detained who sought greater procedural or substantive rights. Therefore, it would be misleading to characterize the 1960's, 1970's and early 1980's as a period in which a due process "revolution" occurred. It is more accurate to say that against the restrictive landscape of the plenary power doctrine, federal courts were more sympathetic to claims arising from the overcrowded and long-term detention of excludable immigrants, than after the mid-1980's when law enforcement and criminal sanctions became an INS priority.

The more favorable treatment of non-citizens' claims to rights against exclusion, deportation and detention in the period immediately preceding the mid-1980's is illustrated by the federal courts' handling of several different immigration matters. In espousing his theory that the federal judiciary has transformed classical immigration law from the Civil Rights Era of the 1950's to the present, Peter Schuck cites some of these examples, among them: the Supreme Court's affirmation of lower court decisions that a lawful permanent resident who returns to the U.S. after a brief trip outside the country is entitled to a due process hearing in spite of the INS's attempt to summarily exclude her on the theory that she made a new "entry" into the U.S.;⁵¹ and the willingness of some federal courts to read into the deportation process limitations drawn from constitutionally-derived criminal protections.⁵²

Claims arising from the mass detention of aliens from Cuba, Haiti, El Salvador and other nations in the Caribbean Basin especially troubled the federal courts. Due to heavy-handed and arbitrary actions on the part of the INS and the harsh, abusive conditions to which even some aliens with colorable claims to legal protections notwithstanding their undocumented status were subjected, federal courts were more willing to intervene in their treatment.⁵³ In a limited number of cases, federal judges intervened to grant broad class relief to large numbers of detainees, undermining harsh policies such as the blanket detention of all undocumented aliens unable to establish a *prima facie* case for admission, mass deportation of detained Haitian refugees and mass processing and denial of the asylum claims of Haitian refugees.⁵⁴

50. ELIZABETH J. HARPER, *THE IMMIGRATION LAWS OF THE UNITED STATES* 612-13 (3d ed. 1975).

51. See SCHUCK, *supra* note 47.

52. Such as Fourth Amendment privacy, *Int'l Ladies' Garment Workers Union v. Sureck*, 681 F.2d 624 (9th Cir. 1982) and the right to counsel, *Aguilera-Enriquez v. INS*, 516 F.2d 565, 369 n.3 (6th Cir. 1975). See SCHUCK, *supra* note 47, at 62.

53. *Id.* at 64.

54. *Id.* Haitian Refugee Center v. Smith, 676 F.2d 1023 (11th Cir. 1982).

C. *The Increasing Prioritization of Law Enforcement from the late 1980's to the Present*

The legal regulation of immigration in the 1950's, 1960's and 1970's is considered by scholars across disciplinary boundaries to have been an era of relative (albeit exceptional) liberalism, easing the immigration restrictionism of the preceding several decades.⁵⁵ Michael LeMay refers to this period as the "Dutch Door" Era,⁵⁶ one that reflected, among other things, the influence of the Civil Rights Movement in changing in national attitudes toward race and racially restrictive immigration policies.⁵⁷ Immigration restrictionists attribute liberal immigration policies of this era to, *inter alia*, pro-alien court decisions by liberal federal judges. Immigration policy of this era generally favored family reunification for naturalized citizens and lawful permanent residents,⁵⁸ broader admission of refugees accompanied by public subsidy and resettlement benefits,⁵⁹ and limited due process protections for some illegal aliens.⁶⁰

Such liberal immigration policies could not be made in the absence of other, extra-legal factors. By the mid 1960's, the U.S. had experienced a long period of low immigration and low unemployment, and the economy was strong. By the mid-1970's the U.S. had withdrawn its troops from Vietnam, touching off a refugee crisis as the US evacuated over 100,000 South Vietnamese government officials, soldiers and others who had supported the U.S. in the war against the Viet Cong.⁶¹ With long-standing precedent favoring the acceptance of refugees from Communist countries, the U.S. response was legislative authorization of generous resettlement assistance, language and vocational training, and medical care for the refugees.⁶² By the late 1970's refugee admission and assistance was significantly expanded,

55. DEBRA L. DELAET, U.S. IMMIGRATION POLICY IN AN AGE OF RIGHTS 2 (2000) ("[T]he fundamental legislative changes to U.S. immigration policy from the 1960's through the 1980's have been comprised of largely liberal measures that have contributed to an increase in immigration to this country."). NORMAN ZUCKER & NAOMI ZUCKER, DESPERATE CROSSINGS: SEEKING REFUGE IN AMERICA 32 (1996) (describing the passage of immigration legislation that ended the racially and ethnically discriminatory national origins quota system in mid-1960's as the "beginning of the era of liberalization").

56. LeMay contends that the Dutch Door Era (1950-80) marked the first time in the twentieth century that immigration restrictions were relaxed, representing a new phase in immigration policy. MICHAEL LEMAY, FROM OPEN DOOR TO DUTCH DOOR 103 (1987).

57. *Id.* at 110.

58. Largely through the provisions of the Immigration Act of 1965, which overturned the national origins quota system and established a preference system that sought to preserve immigrant families and reunite separated families. *Id.* at 111-12. See also MORRIS, *supra* note 8, at 55.

59. JAMES G. GIMPEL & JAMES R. EDWARDS, THE CONGRESSIONAL POLITICS OF IMMIGRATION REFORM 120 (1999). See also LEMAY, *supra* note 56, at 114-115.

60. SCHUCK, *supra* note 47, at 64-65 (criticizing judicial granting of rights to illegal aliens, particularly undocumented detainees: "the courts have transmuted classical immigration law's conception of the nature of the government-alien relationship into a rather different one in which rights against the government accrue to aliens without the government's consent and without the formal conditions for immigration having been observed").

61. GIMPEL & EDWARDS, *supra* note 59, at 119-20.

62. *Id.* at 120.

culminating in the Refugee Act of 1980.⁶³ The Act established a new quota for refugees independent of family reunification-based and business-oriented visa quotas, thereby eliminating limits on refugee admissions established under the 1965 preference system.⁶⁴ The Refugee Act also appropriated a supplemental \$100 million for emergency refugee resettlement assistance.⁶⁵ One prominent immigration scholar has argued that by changing the definition of "refugee,"⁶⁶ the 1980 legislation increased the number of individuals eligible for refugee status from 3 million to nearly 13 million⁶⁷ by broadening the category of refugee from those fleeing communism or the Middle East to anyone with a well-founded fear of persecution due to race, religion, nationality, membership in a social group or political opinion.⁶⁸ Also passed in the same congressional session was legislation reauthorizing public assistance and educational services for refugees from Cuba, Haiti and Indochina.⁶⁹ In the early 1980's, a confluence of factors, including post-industrial economic decline, skyrocketing unemployment, the ascendancy of right-wing political conservatism, negative public attitudes toward the dramatic increase of legal immigration made possible by legislative changes in 1965 and 1980, and trepidation about rising illegal immigration, contributed to a fundamental shift in policy toward legal and illegal immigration.⁷⁰ Public sentiment around immigration changed dramatically from a willingness to absorb and generously resettle refugees and tolerance of illegal immigration to a growing sense of crisis that the United States had "lost control of its borders" and that U.S. immigration policy was dangerously adrift.⁷¹ The War on Drugs focused attention on the inability of the customs

63. See generally Pub. L. No. 96-212, 94 Stat. 102 (1980).

64. GIMPEL & EDWARDS, *supra* note 59, at 130; see also GIL LOESCHER & JOHN SCANLAN, *CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT* 154 (1986).

65. GIMPEL & EDWARDS, *supra* note 59, at 130.

66. SIMCOX, U.S. IMMIGRATION IN THE 1980'S: REAPPRAISAL AND REFORM 52 (1988).

67. LEMAY, *supra* note 56, at 121 (citing ARNOLD LEIBOVITZ, *THE REFUGEE ACT OF 1980: PROBLEMS AND CONGRESSIONAL CONCERNS*, *ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE* 163-71 (1983)).

68. HELEN HAYES, U.S. IMMIGRATION POLICY AND THE UNDOCUMENTED: AMBIVALENT LAW, *FURTIVE LIVE* 19 (2001).

69. GIMPEL & EDWARDS, *supra* note 59, at 130.

70. This brief summary greatly condenses and simplifies events that were more far nuanced. It is widely thought that while Congress moved toward tighter limits on immigrant access to public benefits, the federal courts continued to liberalize federal entitlements for refugees and illegal immigrants through judicial opinions in such cases as *Plyler v. Doe*, 457 U.S. 202 (1982) (requiring states to provide free public education to children of illegal aliens), *Lewis v. Gross* (1986) (requiring California's public universities to enroll illegal aliens at in-state tuition rates) and *Berger v. Hechler*, 771 F.2d 1556 (2d Cir. 1985) (prohibiting federal agencies from amending a mistaken policy of distributing Supplemental Security Income (SSI) to illegal aliens). See SIMCOX, *supra* note 66, at 38.

71. This sense of crisis is reflected in the public admission of Attorney General William French Smith that the US was "unable to control its borders." *Plan on Illegal Aliens to be Disclosed Soon by the Administration*, N.Y. TIMES, June 28, 1981, at 31 (reporting Mr. Smith's statement at a meeting of the Florida Bar Association that "[w]e have lost control of our own borders. We have lost control of not only the number, but also the type of persons who enter the country"). See also THE SELECT

and immigration services to prevent contraband and foreign drug couriers from crossing U.S. borders.⁷² These inadequacies within the Immigration and Naturalization Service coupled with the emerging role of the U.S. border as a “crime scene” encouraged Congress to resort to the use of criminal penalties and enhanced law enforcement to staunch the flow of both contraband and illegal immigration across the border.

The shift from more benevolent to harsher attitudes toward legal and illegal immigration—what Senator Alan Simpson referred to as “compassion fatigue”⁷³—came about as a result of several factors including: the expense of resettling close to a million Southeast Asian refugees after 1975,⁷⁴ and the growing reality of persistent welfare dependency and heavy clustering in a few key regions;⁷⁵ burgeoning numbers of Mexicans surreptitiously crossing the border and entering the United States illegally after Mexico’s economic collapse in 1983;⁷⁶ rising public concern about the criminality of illegal immigrants and refugees arising from reports of high crime rates—particularly drug-related crimes—among Miami’s Mariel boatlift refugees and complaints from local officials in the Southwest about increased crime and drug smuggling among illegal aliens;⁷⁷ and rising social and political resistance to bilingualism and multilingualism.⁷⁸ This series of developments and trends since the mid-1970’s highlighted to the public the disorderliness of the government’s handling of immigration and emphasized the social costs of a compassionate response to mass immigration from poor countries while the social benefits became less clear.⁷⁹

COMM’N ON IMMIGRATION AND REFUGEE POLICY, MARCH 1, 1981 FINAL REPORT AND RECOMMENDATIONS 10, 12 (1981) [hereinafter SELECT COMM’N].

72. See generally PETER ANDREAS, *BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE* (2000) (analyzing law enforcement efforts to control the U.S. borders and their focus on drugs and illegal immigrants) and Kevin R. Johnson, *U.S. Border Enforcement: Drugs, Migrants, and the Rule of Law*, 47 VILL. L. REV. 897, 898 (2002) (describing how drug and immigration enforcement are “inextricably linked”).

73. SIMCOX, *supra* note 66, at 3.

74. *Id.*

75. *Id.*

76. *Id.* at 4. For an intriguing discussion of the growing association of undocumented immigrants and criminality during the early 1990’s, see KENT A. ONO & JOHN M. SLOOP, *SHIFTING BORDERS: RHETORIC, IMMIGRATION AND CALIFORNIA’S PROPOSITION 187* 32-34 (2002).

77. SIMCOX, *supra* note 66.

78. *Id.* at 4.

79. According to some political scientists, refugee admissions radically changed the generally supportive Congressional posture toward immigration by linking immigration policy to (income) redistributive policy at the national level. Prior to the late 1970’s, immigrant assistance from the federal government was uncommon. However, unprecedented flows of new and desperately poor refugees in the late 1970’s generated a host of aggressive federal spending and a new agency within the Department of Health, Education and Welfare (HEW), “the nation’s largest welfare bureaucracy” to which conservatives responded with staunch opposition. GIMPEL & EDWARDS, *supra* note 59, at 132-34, 144. See generally DAVID M. REIMERS, *UNWELCOME STRANGERS: AMERICAN IDENTITY AND THE TURN AGAINST IMMIGRATION* (1998).

The persistent, but overlooked problem of visa overstayers came to light in 1979 when student demonstrations led President Carter to order the deportation of some 60,000 Iranian students. INS was unable to locate most of them due to poor recordkeeping. SIMCOX, *supra* note 66 at 46.

While the economic and cultural costs of absorbing illegal aliens crossing the Mexican border and resettling Southeast Asian refugees began to turn the tide of American compassion for new immigrants, the mass migration of Cubans who flooded South Florida via the Florida Straits in the Spring of 1980, penniless and without authorization to enter the country, was the straw that broke the camel's back.⁸⁰ The Mariel Cubans were an influx of illegal aliens who arrived in the United States by boat from about April to September of 1980. Frequently referred to as the Fifth Wave of Cuban migration, the Mariel Cubans were an influx of poor and working class Cubans launched from Mariel Harbor in a ploy by Fidel Castro to undermine the political currency of the U.S. government's claim that Cubans were desperate to escape Communism and were trapped in Cuba by a ruthless dictator. On April 20, 1980, Castro opened Mariel Harbor to hundreds of boats piloted by Cuban exiles arriving to take friends and relatives back to the United States "illegally" and to makeshift boats and rafts filled with those wishing to leave Cuba. Declaring that "anybody who wishes to go to any other country where he is received, good riddance,"⁸¹ Castro hoped to embarrass the Carter Administration by creating a chaotic, disorderly flood of illegal immigration from Cuba while appearing to be grandiose. It worked. Nearly nine thousand Cubans arrived in Key West on the first two days, and thousands continued to arrive daily in a wave of immigration that would exceed 120,000.⁸²

The imposition of criminal sanctions for conduct that previously amounted to civil violations—in other words, the creation of new categories of criminal offenses—was not the inevitable consequence of compassion fatigue. However, the legislative will to criminalize certain kinds of immigration-related conduct correlates closely to a crisis of legitimacy that immigration policy experienced after 1975—acutely so after the 1980 Mariel Boatlift—as well as the popularity of "tough on crime" measures already well underway in the same legislative arena.⁸³

80. LAMM AND IMHOFF, *THE IMMIGRATION TIME BOMB* 229 ("Until the Mariel Boatlift there was no single precipitating crisis that alerted and energized the public."); SIMCOX, *supra* note 66 at 3. ("Probably no event of the period did more to crystallize these concerns (about the social costs of immigration, its magnitude and its apparent imperviousness to government control) than the 1980 Mariel Boatlift.").

81. FELIX MASUD-PILOTO, *FROM WELCOMED EXILES TO ILLEGAL IMMIGRANTS: CUBAN MIGRATION TO THE U.S. 1959-95* 85 (1996).

82. *Id.* at 92.

83. The fact that crime control reforms were being debated and adopted by Congress at the same time Congress was confronting crises of illegal immigration contributed to the cross-fertilization between crime and immigration reform. "Tough on crime" measures that were being debated and adopted by Congress and state legislatures as early as the 1970's included determinate sentencing, mandatory minimum sentencing, "three strikes" laws, harsh sentences for "career criminals," tough juvenile sanctions, and the adoption of numerous death penalty statutes at the state and federal levels. See generally, MAUER, *supra* note 1, at 50-80.

Indeed, the philosophical shift on immigration policy Senator Simpson referred to as "compassion fatigue" reflects a parallel shift in crime policy promoted by the Reagan Administration in the 1980's.

Disrespect for the rule of law was at the center of the crisis. Mexican immigrants were breaching the Southern Border by evading (and in some instances attacking) Border Patrol Agents, intent on securing work opportunities within the United States. Waves of Haitians, Cubans and other Caribbean Basin nationals desperately fleeing conditions in their home countries invaded the Florida Straits via boats, rafts and whatever would float without access to, or regard for, the processes for obtaining legal status to enter the United States.

The Mariel Boatlift represented a particularly offensive disrespect for the rule of U.S. immigration law. Castro's rumored purging of thousands of Cuban inmates and mental patients dispatched by the boatload to the Florida Straits where they would receive favored refugee treatment under existing immigration law gave many the impression that "a fraying American immigration policy was being made not in Washington, but in a foreign land."⁸⁴ Indeed a report of the Select Committee on Immigration and Refugee Policy appointed by President Carter in 1979 reported to President Reagan in 1981 that:

In recent months, we have received a large number of letters 'from people who complain that immigration policy is out of control.' They are right. Now undocumented aliens come to the United States in large numbers . . . *By permitting our laws to be flouted, we bring immigration policy as a whole into disrespect and, more important in the long run, we undermine respect of law, the foundation of a free society.*⁸⁵

To many proponents of greater immigration restrictionism in the 1980's and 1990's, immigrants—particularly illegal immigrants—were inextricably

Reagan's "get tough" approach to crime control was motivated, as Mauer points out, by his belief that "big government" could not solve intractable social problems. Reagan shifted the blame onto individuals who he believed were "responsible for their own destiny in this land of opportunity." *Id.* at 60. The legislative response to "compassion fatigue"—criminalization of immigration-related conduct that was previously discouraged through civil sanctions—similarly averted its eyes from the roles society and the economy play in encouraging illegal immigration and focused upon the immigrant as the object of scorn and punishment. This excerpt from a 1982 speech on crime policy delivered by President Reagan is as applicable to his views on immigration policy as it was to crime policy at the time:

[The American People] utterly reject . . . utopian presumptions about human nature that see man as primarily a creature of his material environment. By changing this environment through expensive social programs, this philosophy holds that government can permanently change man and usher in an era of prosperity and virtue. In much the same way, individual wrongdoing is seen as the result of poor socioeconomic conditions or an underprivileged background. This philosophy suggests in short that there is crime or wrongdoing, and that society, not the individual, is to blame.

Id. In this speech, President Reagan rejects the New Deal "Great Society" program for the domestic poor as unequivocally as he does for illegal immigrants, and in doing so, justifies more punitive measures toward both.

84. SIMCOX, *supra* note 66, at 3.

85. *From a Report by the Select Commission on Immigration and Refugee Policy by Its Chairman, the Rev. Theodore M. Hesburgh*, WASH. POST, Nov. 13, 1980, at A22; SELECT COMM'N, *supra* note 71, at 10, 12 (1981) (emphasis added).

linked to the crisis of crime that was transforming American cities.⁸⁶ Peter Brimelow wrote that "immigration is not the only cause of crime. It may not even be the major cause of crime. But it is a *factor*."⁸⁷ Restrictionists strongly associate both legal and illegal immigration with a new wave of organized ethnic crime, including Asian gangs, the Russian Mafia and Colombian drug rings.⁸⁸

With a changed perspective on immigration that unsympathetically viewed illegal aliens as lawbreakers, Congress marshaled in its "war" on illegal immigration many of the same resources it was already deploying in its war on drugs.⁸⁹ Congress' willingness to add the tools of crime control to its "arsenal" of weapons to fight illegal immigration led to the passage of the Immigration Reform and Control Act of 1986, imposing unprecedented criminal penalties upon employers who hired illegal aliens. David Simcox characterizes the legislation as "American immigration's watershed event in the 1980's."⁹⁰ Supported by organized labor, but opposed by a powerful agribusiness lobby, employer sanctions had been on the congressional backburner since 1972. Employer sanctions finally passed with growing recognition that the floodgates of illegal immigration were only opening wider and the consensus that the problem was not just a labor problem or an agricultural problem, but a much deeper, intractable problem for a broad spectrum of interest groups.

1. *IRCA of 1986*

The Immigration Reform and Control Act of 1986⁹¹ was the first legislation in a series of immigration reforms that sanctioned the broader use of

86. Peter Brimelow, an ardent and vocal crusader for immigration restrictionism since the 1980's, cited the high percentage of illegal aliens within the criminal alien population as evidence of how the U.S. lost control over its borders. PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER* 183 (1995). Indeed there is a tendency to collapse illegal aliens and criminal aliens into a single category of dangerous immigrants. Wayne Lutton and John Tanton commented that "[A]ll illegal aliens show at least some propensity for crime by their very presence, possible only through the violation of at least one law." WAYNE LUTTON AND JOHN TANTON, *THE IMMIGRATION INVASION* 61 (1994).

87. BRIMELOW, *supra* note 86, at 182. Brimelow also argues that the media have suppressed information about the links between crime and America's "Second Great Wave of Immigration" including a large population of non-citizens in US prisons and jails and a high rate of criminal recidivism and illegal reentry among deportable aliens. *Id.* at 182-83.

88. DAVID M. REIMERS, *UNWELCOME STRANGERS: AMERICAN IDENTITY AND THE TURN AGAINST IMMIGRATION* 79-81 (1998) (describing how immigration critics in the 1980's and 1990's perceived the American Immigration System as broken as a result of lax criminal screening of aliens seeking admission and insufficient assimilation of admitted aliens) (citing John Tanton & Wayne Lutton, *Immigration and Criminality in the U.S.A.*, 18 J. SOC. POL. ECON. STUD. 217 (1993); FAIR, *Immigration-Related Crime Wave Hits America's Heartland*, FAIR IMMIGRATION REPORT (June 1996); BRIMELOW, *supra* note 86, at 185-86. For a general discussion of contemporary foreign crime syndicates and U.S. immigration, see LUTTON & TANTON, *supra* note 86, at 61-84.

89. See SIMCOX, *supra* note 66, at 3.

90. *Id.*

91. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986). President Reagan signed the IRCA into law on November 6, 1986.

criminal penalties for immigration-related conduct and beefed up enforcement of immigration law. There were four major provisions of the legislation: employer sanctions, increased immigration law enforcement, an amnesty program for certain undocumented aliens and special provisions relating to foreign agricultural workers.⁹²

(a) *Employer sanctions*

One striking aspect of the IRCA, particularly when viewed in light of criminal penalties imposed in later legislation, is that employers—not illegal aliens—were singled out for punishment. It was widely believed that employer sanctions would discourage illegal immigration by turning off the “job magnet” that lured illegal aliens across the border.⁹³ Under the IRCA’s employer sanctions provisions, employers were prohibited from hiring, recruiting or referring for a fee non-citizens known to be unauthorized to work in the United States. The IRCA requires all employers to complete the Employment Eligibility Verification Form (I-9) for all employees, including examining employees’ papers, verifying their identity and employment status, and making a good faith effort to determine whether the documents appear to be genuine.⁹⁴ Employers who violate the law are subject to a series of civil fines and to criminal penalties, including incarceration, when there is a pattern or practice of violations.

(b) *Enhanced law enforcement*

The enforcement provisions of the IRCA are likewise considered to be an innovation.⁹⁵ Prior to the passage of the IRCA, eleven states and one city had adopted employer sanctions that were not enforced. In contrast, the fines and penalties imposed under the IRCA were expected to successfully discourage employment of illegal aliens because of the enforcement resources allocated in the legislation. The IRCA sought to prevent and deter illegal border crossing by recommending increases in inspection and enforcement. It further authorized an increase in Border Patrol appropriations in fiscal years 1987 and 1988 of fifty percent above the fiscal year 1986 level.⁹⁶ An

92. The amnesty provisions addressed the interests of ethnic and labor lobbies. Western growers and secondary market employers sought the *quid pro quo* of guarantees of other routes to seasonal laborer in exchange for employer sanctions. HAYES, *supra* note 68, at 48.

93. It is broadly acknowledged that the IRCA ultimately failed to achieve its goal of restricting illegal immigration. Although data suggest that there may have been a short-term decline in the number of undocumented workers residing in the US immediately following the IRCA’s passage, the decline has been attributed to the IRCA’s legalization provisions. In the long run, the IRCA failed to decrease the flow of undocumented workers into the U.S. or to alter employers’ hiring practices. DELAET, *supra* note 55, at 60-63.

94. FRANCISCO L. RIVERA-BATIZ, U.S. IMMIGRATION POLICY REFORM IN THE 1980’S: A PRELIMINARY ASSESSMENT 20-21 (1991).

95. *Id.* at 5.

96. *Id.* at 21.

additional enforcement measure was mandatory state participation in an automated on-line system to verify instantly an alien's immigration status: INS' Systematic Alien Verification Entitlement ("SAVE") system. All states are required to use the system to prevent fraudulent acquisition of public benefits unless they can demonstrate that it would not be cost-effective.

The law enforcement and crime provisions of the IRCA that shocked commentators at the time pale in comparison to the legislative measures taken in 1996 to further strengthen the enforcement of immigration law and control crime through immigration reforms. Indeed, as one immigration attorney noted, immigration law reforms adopted in the decade that began with the IRCA of 1986 are striking for their increased criminalization of immigration law.⁹⁷ The crisis of legitimacy surrounding U.S. immigration law that led to tougher law enforcement measures and the use of criminal sanctions in the IRCA of 1986 yielded to a renewed sense of crisis that lead Congress to take Draconian measures against undesirable, "criminal" aliens a decade later.

The increasing employment of criminal law ideologies and practices in the past two decades falls within two principal categories: (1) greater criminal punitiveness within a nominally civil system of immigration regulation; and (2) greater criminal consequences for immigration violations, many of which were previously treated civilly. I will discuss each in turn.

IV. GREATER GREATER CRIMINAL PUNITIVENESS WITHIN A NOMINALLY CIVIL SYSTEM OF IMMIGRATION REGULATION

Criminal punitiveness within the immigration system is most apparent in the case of deportation and detention. Deportation refers to the expulsion of a non-citizen upon the administrative finding that he is no longer entitled to remain in the United States.⁹⁸ The shift toward greater punitiveness within

97. Morris, *supra* note 18.

98. The AEDPA and the IIRIRA altered the concept of deportation, collapsing both deportation and exclusion into the broader category of "removal." See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 304(a), 8 U.S.C. § 1229 (1996). For the purposes of this article I have chosen to use the old terminology due to the interdisciplinary nature of this article and the familiarity of the broader audience I hope to reach with the older terminology. Deportation was traditionally contrasted with exclusion, the expulsion of an alien who has not been administratively declared eligible to enter the United States. One significant difference between exclusion and deportation rested on a legal fiction—the "entry fiction"—that an alien who is physically within the U.S. could be treated as if he or she was outside the country for constitutional purposes. Once the alien was deemed to have entered, he or she was granted limited constitutional rights. This legal fiction justified treating deportable aliens differently from excludable aliens. Excludable aliens have almost no rights, whereas deportable aliens were afforded somewhat more extensive rights. The entry fiction was dispensed with in 1996 when Congress collapsed exclusion and deportation proceedings into a single proceeding known as "removal." *Id.* The concept of "admission" replaced the concept of "entry". Aliens who have not been admitted to the U.S. are subject to removal on grounds of inadmissibility. Immigration and Nationality Act § 212, 8 U.S.C. § 1182(a) (1952). Aliens who have been admitted to the US are subject to removal only on grounds of deportability. *Id.* at § 237. For a brief, basic explanation of how the 1996 legislation eliminated the concept of "entry" and replaced it with "admission," see FRAGOMEN, *supra* note 12, at 1-11, 1-12 (2002).

the framework of a nominally civil system of immigration regulation is apparent in changes in the law regarding deportation for all immigrants. However, Congress has given the deportation of those non-citizens with criminal convictions in their past, and, more recently, terrorism suspects, the highest priority. Consequently, the most criminally punitive treatment with the fewest avenues for relief has been reserved for non-citizens with criminal convictions in their pasts and those suspected of ties with organized terrorism.

A. *Criminal Aliens*

The term “criminal alien”⁹⁹ refers to a non-United States citizen with a criminal conviction in his or her past. Although the term itself has taken on a nefarious connotation, the state of being a non-citizen with a past criminal conviction has grave immigration consequences *only* if the crime for which the non-citizen was convicted triggers the deportation power of the INS. Immigration law has long provided for the deportation of criminal aliens who commit particular types of crimes. However, within the past two decades the range of crimes for which a criminal alien can be deported has expanded exponentially. Coupled with more aggressive apprehension and detention of criminal aliens on the part of INS law enforcement, deportation statistics have risen steeply.¹⁰⁰ In addition to expanding the grounds for deporting criminal aliens, recent legislation has mandated detention of deportable criminal aliens, limited the grounds for relief from detention and deportation, limited federal judicial review of detention and deportation orders, and applied the broader range of deportable crimes retroactively to crimes for which deportation was not a consequence previously.

B. *Deportation for Crimes of Moral Turpitude*

Crimes for which criminal aliens may be deported are roughly classified into three groups: crimes of moral turpitude, aggravated felonies and other more offense-specific crimes. The broadest category of criminal activity for which a criminal alien may be deported is a crime of “moral turpitude.” Although somewhat amorphous and ambiguous in scope, a crime of moral turpitude is generally understood to mean a crime involving an act that is intrinsically or morally wrong or reprehensible, rather than merely statutorily prohibited.¹⁰¹ Crimes such as murder, robbery, kidnapping, voluntary man-

99. The term “criminal alien” only recently came into vogue. Prior to the 1980’s “convicted aliens” was more often used to refer to non-citizens with criminal convictions in their pasts.

100. The number of non-citizens deported from the U.S. as a result of criminal convictions grew from 1,000 in 1984 to over 55,000 in 1998. Anna Maria Gallagher, *Immigration Consequences of Criminal Convictions: Protecting Your Client’s Immigration Interests in Criminal Proceedings*, IMM. BRIEFINGS, No. 01-4, 2 (2001).

101. DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES § 1:7, 1-14 (1984); IRA KURZBAN, KURZBAN’S IMMIGRATION LAW SOURCEBOOK 49 (8th ed. 2002), citing *Matter of Franklin*, 20 I&N Dec. 867,868 (BIA 1994), *aff’d* 72 F.3d 571 (8th Cir. 1995).

slaughter, child abuse, and assault with intent to inflict serious bodily injury have traditionally been considered moral turpitude crimes. Prior to 1996, a criminal alien who committed a crime of moral turpitude was deportable if: (1) the crime was committed within five years of entry and a sentence of one year or more of confinement was *actually* imposed, or (2) two crimes of moral turpitude, not arising out of the same criminal scheme, are committed at any time after entry regardless of the sentence imposed. After 1996, criminal conviction of a crime for which a sentence of one year or more *may* be imposed is sufficient to trigger deportation. Thus a light sentence, which may reflect mitigating circumstances surrounding the defendant's guilt, will nonetheless trigger harsh immigration consequences. Furthermore, after 1996, a sentence refers to a time of incarceration or confinement ordered by a court, even if the time of confinement is *suspended* or the execution is *withheld*.¹⁰²

Prior to 1986, in addition to moral turpitude crimes, criminal aliens could be deported for crimes involving controlled substances and certain weapons offenses.¹⁰³ In reality, deportation proceedings were rarely commenced. Since the Immigration and Nationality Act ("INA") provided, with narrow exceptions, that non-citizens who are incarcerated could not be deported until they were released from prison, lack of resources and infrastructure to track down deportable criminal aliens and enforce their deportation orders resulted in the deportation of only a fraction of criminal aliens.¹⁰⁴

C. *Aggravated Felons*

The Anti-Drug Abuse Act of 1988 created a new category of crimes for which a criminal alien could be deported. This new category of crimes—"aggravated felonies"—included murder, drug trafficking and firearms trafficking crimes. Most of the drug and firearms crimes previously covered by the statute, crimes of moral turpitude and other crimes were included under the re-definition of aggravated felony.¹⁰⁵

The scope of crimes defined as aggravated felonies has continued to grow in waves of subsequent legislation. Virtually every major piece of immigration legislation since 1988 has expanded the definition of "aggravated

102. KURZBAN, *supra* note 101 at 119-20.

103. Specifically, a conviction within five years after the date of entry for a crime of moral turpitude with a sentence of at least one year in prison; a conviction at any time after entry for two crimes of moral turpitude, regardless of the sentence; a conviction at any time after entry for violation of a controlled substance law; or a conviction at any time after entry for unlawful possession of an automatic weapon. Peter Shuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367, 386-7 (1999).

104. Margaret Taylor & Ronald Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1134-35 (2002).

105. Shuck & Williams, *supra* note 103, at 388.

felony.”¹⁰⁶ The significance of the exponential growth of aggravated felonies is threefold. First, the degree of severity of crimes considered “aggravated felonies” has lost a clear, rational connection to the nefarious connotation it has in the criminal law. Immigration law now defines certain types of criminality *more broadly* than the criminal law. Second, the deportation consequences for criminal aliens convicted for aggravated felonies are quite severe. Any non-citizen convicted of an aggravated felony at any time after admission is deportable, frequently without regard to the length of the sentence imposed or that may be imposed. Third, since the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) applied the amended definition of an aggravated felony *retroactively*,¹⁰⁷ many more criminal aliens became subject to the more severe consequences reserved for aggravated felons. The impact of retroactivity has been that non-citizens including long-term legal permanent residents (LPRs) who committed relatively minor crimes long ago are being deported with virtually no legal recourse for past offenses that were not deportable crimes at the time of conviction. In addition to offending established precedent against reading statutes retroactively, it precludes a criminal alien’s successful rehabilitation from consideration in the detention and deportation process.¹⁰⁸

The Immigration Act of 1990 expanded the definition of “aggravated felonies” to crimes of violence for which the sentence is at least five years.¹⁰⁹ Four years later, the Immigration and Technical Corrections Act expanded the definition to include additional firearms and explosives offenses, some theft or burglary offenses, some types of fraud, prostitution and a few other offenses.¹¹⁰ The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) expanded the scope of existing aggravated felonies related to gambling, transportation for purposes of prostitution, alien smuggling, passport fraud, and other forms of document fraud. The Act expanded the definition to include new offenses involving: obstruction of justice, perjury or bribery offenses for which a sentence of at least five years or more may be imposed; commercial bribery, forgery, counterfeiting and vehicle trafficking offenses for which a sentence of at least five years or more may be imposed; offenses committed by an alien ordered previously deported; and offenses relating to skipping bail for which a sentence of two or more years may be

106. Juan P. Osuna, *Criminal Aliens and Terrorists*, in UNDERSTANDING THE 1996 IMMIGRATION ACT, 4-2 (1st ed. 1997).

107. The IIRIRA provides that “[n]otwithstanding any other provision of law,” the amended definition of aggravated felony applies regardless of whether the conviction was entered before, on or after the date of enactment of the Act (September 30, 1996). Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 321(b).

108. The diminishing importance of rehabilitation is a familiar theme within crime control reforms of the 1980’s as well. For a recent commentary on the irony of life-without-parole, or so-called “natural life” sentences, see Daniel Bergner, *When Forever is Far Too Long*, N.Y. TIMES, June 17, 2003, at A27.

109. Pub. L. No. 101-649, 104 Stat. 4978 (1990).

110. Pub. L. No. 103-416, 108 Stat. 4305 (1994).

imposed.¹¹¹

Five months later, the IIRIRA not only expanded the definition of aggravated felonies once again to include new offenses such as rape and sexual abuse of a minor, but it also lowered the sentence length and monetary amount thresholds involved in many crimes defined as aggravated felonies. For example, the IIRIRA lowered the amount of funds involved in a money laundering crime to be considered an aggravated felony from \$100,000 to \$10,000 and lowered to one year the sentence length required for many “crimes of violence” and theft offenses to be considered aggravated felonies.¹¹²

D. *Deportation for Other Offense-Specific Crimes*

Although non-citizens convicted of aggravated felonies and crimes of moral turpitude make up the vast majority of deportable aliens, the AEDPA, IIRIRA and various other statutes enacted since the mid-1980’s subject non-citizens convicted of a variety of other types of crimes—most notably terrorism-related crimes—to apprehension, detention and deportation.

After September 11, 2001, non-U.S. citizen terrorism suspects joined criminal aliens on the INS’s “most wanted” for deportation list. In response to the increasing perception that alien terrorist suspects presented intractable problems of immigration law enforcement, Congress passed the AEDPA in April 1996, which contained several important alien terrorist provisions.¹¹³ These provisions were amended and strengthened just five months later when the IIRIRA was enacted in September 1996. Together, these statutes created special removal proceedings for aliens suspected of terrorism, including a removal court made up of five federal district court judges.¹¹⁴ Under the special removal procedures for suspected terrorists, the government bears a lesser burden of proof on the issue of deportability, discovery is limited, even prohibited in the case of classified information, judicial review is expedited, and the customary forms of relief from removal are unavailable.¹¹⁵

E. *Mandatory Detention of Certain Criminal Aliens*

Since 1996, many avenues of relief from detention that were once available to criminal aliens who are subject to deportation have been foreclosed. These forms of relief included waiver, bond and release on the alien’s own recognizance. The Anti-Drug Abuse Act of 1988 provided that aggravated felons, including lawful permanent residents, would be subject to

111. Pub. L. No. 104-132, 110 Stat. 279 (1996).

112. Osuna, *supra* note 106, at 4-2.

113. *Id.* at 4-7.

114. *Id.* at 4-8.

115. Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269, 285-86 (1997).

mandatory detention without bond. IIRIRA subsequently provided for the mandatory detention of virtually all criminal aliens subject to deportation, regardless of family ties, dependent children, or the extensiveness of the alien's ties to his community.¹¹⁶ Immigration detention is onerous for all detainees because of the character of the facilities in which they are held. Immigration detainees are securely confined in county jails, federal lockups and INS detention centers under conditions that are more restrictive than those in many state prisons.¹¹⁷ These restrictive conditions are particularly harsh and inequitable for lawful permanent residents, many of whom have resided in the U.S. for many years and have children and other family members who are U.S. citizens.¹¹⁸

The mandatory detention provisions in the ADAA and the IIRIRA dramatically increased the volume of detainees confined and the length of their confinement. For example, in 1981 the average stay in an INS detention facility was less than four days.¹¹⁹ By 1990, it grew to 23 days, with many individuals detained for more than a year,¹²⁰ and a year later it had more than doubled to 54 days.¹²¹ After the enactment of the 1996 legislation the range of time in detention expanded greatly. By 1998 the average length of detention had dropped to 34 days,¹²² primarily reflecting the expedited removal of large numbers of Mexican nationals at the southern border. After 1996, far greater numbers of aliens were moving through the detention system, ranging from a mere two days to several years. The numbers reflect not only the increasing volume of detainees, but the broader scope of

116. INA Section 236(c) provides that the Attorney General shall detain and shall not release aliens who have been convicted of aggravated felonies, multiple crimes involving moral turpitude, controlled substance violations, certain firearm offense, a moral turpitude crime committed within five years of the date of admission, and crimes involving terrorism. FRAGOMEN, ET AL., *supra* note 12, at 1:42.

117. While the conditions under which detainees are confined may resemble that of their criminal counterparts, they are, in fact, far worse. Detainees have fewer due process rights than are granted to American prisoners. Aliens have no right to court appointed counsel. This means that if a detainee cannot afford legal services, he must go without. In fact, the Executive Office for Immigration Review has reported that less than 11% of detainees receive attorney assistance. Donald Kerwin, *Throwing Away the Key: Lifers in INS Custody*, 75 INTERPRETER RELEASES 649, 659 (1998). Detainees are also cut off from services simply because they do not speak the language. The INS usually only provides detainees with translators in the event of an emergency or a medical examination, and often these are provided by phone. Wendy Young, *US Detention of Women and Children Asylum Seekers: A Violation of Human Rights*, 30 U. MIAMI INTER-AM. L. REV. 577, 586 (1999). The few services to which detainees do have access are threatened by the explosion in the number of immigration detainees. The INS is sending more aliens to detention centers that are already overcrowded and understaffed.

118. Mandatory detention has been constitutionally challenged in the courts on a few grounds. Several federal courts of appeals have taken the position that the mandatory detention of lawful permanent residents without an individualized bond hearing violates due process. *See* Kim v. Ziglar, 276 F.3d 523, 526 (9th Cir. 2002); Patel v. Zemski, 275 F.3d 299, 311 (3d Cir. 2001).

119. ACLU Immigrants' Rights Project, *Justice Detained: Conditions at the Varick Street Immigration Detention Center* (1993), p.1.

120. *Id.* Welch, *supra* note 14.

121. ACLU Immigrants' Rights Project, *supra* note 119.

122. *Testimony of Doris Meissner, Commissioner of the INS before the Subcommittee on Immigration, U.S. Senate Judiciary Committee*, 1998 WL 18089535 (Sept. 16, 1998).

detention as well. The numbers further reflect the fact that the INS began to detain categories of immigrants—such as lawful permanent residents, women, children and families—it had traditionally released in the past.

F. *Elimination of Judicial Review of Parole and Bond Decisions*

Prior to the passage of the AEDPA, criminal aliens had a range of relief from deportation available to them, including suspension of deportation under Section 212(c) of the INA, adjustment of status, and political asylum-based withholding of deportation. Section 440(d) of the AEDPA foreclosed such relief by barring most aliens deportable on criminal grounds from cancellation or suspension of their deportation orders.¹²³

Section 236(c) of the INA provides that a non-U.S. citizen residing in the United States who has been convicted of an aggravated felony may not be released on bond. This mandatory detention provision passed as part of the IIRIRA. Once a non-citizen completes a criminal sentence, he or she is detained by the INS for removal purposes and is entitled to a bond hearing in front of an immigration judge. If the immigration judge determines that the alien is detainable under section 236(c), the judge is precluded from inquiring into grounds that might exist for releasing a detainee on bond.

G. *The Use of Criminal Law Enforcement Methods to Enforce Civil Orders*¹²⁴

One of the most unprecedented changes to accompany the beefing up of immigration law enforcement has been the increasingly cooperative relationship between local and state law enforcement officers and the INS. Traditionally, local and state law enforcement was separate from federal enforcement of most immigration orders. State and local law enforcement officers were expressly authorized to enforce the *criminal* provisions of the federal immigration statute—the Immigration and Naturalization Act (INA)—as early as its enactment in 1952. However, the Department of Justice has historically taken the position that “local police should refrain from detaining any person not suspected of a crime, solely on the ground that they may be

123. . Pub. L.No. 104-132, 100 Stat. 1214 (1996). Despite the fact that the IIRIRA re-established the statutory eligibility of most criminal aliens by limiting section 44(d) to aggravated felons, the change is on paper only since the term has been so greatly expanded that most felons qualify as aggravated felons.

Prior to the passage of the AEDPA, Section 212(c) of the INA allowed the INS, in its discretion, to waive the deportation of criminal aliens. Section 440(d) of the AEDPA barred the availability of Section 212(c) relief to most criminal aliens. When the IIRIRA was enacted several months after the AEDPA was passed, the latter act overturned Section 212(c), replacing it altogether with Section 240A(a). See *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, 110 Stat. 309-546 at § 309 (1996).

124. See generally Lenni B. Benson, *By Hook or by Crook: Exploring the Legality of an INS Sting Operation*, 31 SAN DIEGO L. REV. 813 (1994).

[civilly] deportable.”¹²⁵ This position was reiterated as recently as 1996 when a formal Department of Justice memorandum concluded that “[s]tate police lack recognized legal authority to arrest or detain aliens solely for purposes of civil immigration proceedings as opposed to criminal prosecution.”¹²⁶ Until the enactment of the AEDPA and the IIRIRA in 1996, this was the official position of the federal government regarding state authority to enforce federal immigration orders with one very narrow exception.¹²⁷ However, with the enactment of the AEDPA and the IIRIRA in April and September of 1996, and the emphasis in these Acts on enhancing immigration law enforcement, Congress has begun to destabilize this well-settled principle. Among the amendments to the INA contained in these statutes are several provisions increasing the scope of state and local law enforcement activity in certain narrow and carefully delineated circumstances. First, Section 439 of the AEDPA authorizes the apprehension and detention of criminal aliens previously deported or having left the United States. It is unclear whether state and local officers can arrest criminal aliens under this section for the newly criminalized act of reentry by a criminal alien. Second, the IIRIRA amended the INA to authorize the Attorney General to enter into agreements with states and localities to allow their agents deemed qualified to perform the investigatory, arrest and detention functions of an immigration officer to do so with sufficient federal oversight. These provisions further permit the INS Commissioner to enter into agreements with state and local law enforcement agencies for the purpose of assisting in the enforcement of immigration laws.

Even where federal immigration officers are not working with criminal law enforcement officers, they are increasingly employing criminal law enforcement techniques in an unprecedented manner. For example, in 1993, the INS District Office in San Diego conducted an undercover “sting” operation to entice deportable aliens into the office.¹²⁸ The office sent 600

125. Jeff Lewis, et al., *Authority of State and Local Officers to Arrest Aliens Suspected of Civil Infractions of Federal Immigration Law*, 7 BENDER'S IMM. BULL. 944 (2002) (citing *Local Police Involvement in the Enforcement of Immigration Law*, 1 TEX. HISP. J.L. & POL'Y 9, 36 (quoting Att'y Gen. Bell, Dep't of Justice Press Release, June 23, 1978)). The logic behind the separation of the authority was that society was better protected if non-citizens legally and illegally residing in the U.S. did not live in fear of police officers, sheriff's deputies and other agents of state and local law enforcement. The established wisdom was that illegal aliens and legal aliens from mixed-status families and communities would not report crimes or assist law enforcement officers in the investigation of crimes if doing so would jeopardize their liberty (or that of relatives and friends).

126. Lewis, *supra* note 125, at 945.

127. Pursuant to an amendment of Section 103(a)(8) of the INA, only in the extraordinary event that the U.S. Attorney General (1) determines that a mass influx of aliens presents an emergency requiring an immediate response, and (2) expressly authorizes state or local law enforcement officers to exercise “powers, privileges, or duties” conferred to federal agents under the INA, could state and local officers exercise the civil arrest powers of INS officers, and then only with the consent of the head of the state or local law enforcement agency, presumably under the close direction of the Attorney General. In the fifty years that this provision has been in effect, this power has been invoked only once, in 1994, during a mass migration of Cuban and Haitian refugees to Florida. *Id.* at 946-47.

128. Benson, *supra* note 124, at 813-14.

letters to aliens extending a “one-time” offer of amnesty and employment authorization pursuant to a purported “new law” recently passed. There was no such law.¹²⁹ However many deportable aliens were apprehended and detained pending deportation.¹³⁰ The INS had previously conducted undercover operations to apprehend aliens involved in serious criminal activities such as buying and selling illegal documents, bribing INS officials and alien smuggling. Nevertheless, the San Diego operation markedly departed from standard INS procedures by using a sting operation to enforce *civil* deportation orders.¹³¹ Another example of the INS adopting law enforcement techniques is the relatively recent arming of INS officers. The Immigration Act of 1990 authorized INS officers to carry firearms, execute warrants and make arrests.¹³²

IV. GREATER CRIMINAL CONSEQUENCES FOR IMMIGRATION VIOLATIONS, MANY OF WHICH WERE PREVIOUSLY TREATED CIVILLY

The second most significant aspect of the criminalization of immigration law—in addition to treating non-citizens with greater criminal punitiveness within a regulatory framework that was formally “civil” in nature—has been the increased prosecution of immigration violations as federal crimes. Since the mid-1980’s, non-citizens have been increasingly brought into the formal criminal justice system by virtue of being prosecuted for federal crimes that were once treated as civil violations or were never previously defined as crimes. Once a non-citizen is convicted under these new categories of crimes, that conviction virtually ensures an alien’s deportation. In this sense, increased federal prosecution of immigration violations feeds the criminal alien “pipeline.”

In the past two decades, criminal prosecutions of immigration violations have increased rapidly. Between 1984 and 1994, the number of individuals prosecuted in the federal courts for immigration felonies and Class A misdemeanors rose from 1,186 to 3,477.¹³³ In addition, about 7,000 individuals are prosecuted annually for B and C misdemeanor immigration violations.¹³⁴

The expansion of categories of federal crimes subjecting non-citizens to formal criminal punishment fall into two main categories: (1) the criminalization of immigration violations that were previously civil violations; and (2) enhanced criminal penalties for existing immigration-related crimes. The significance of criminalizing civil violations is that the criminal prosecution

129. *Id.*

130. Although “the INS admitted that two of the people apprehended in the sting were later released because they had actually become lawful permanent residents.” *Id.* at 814, n.3.

131. *Id.* at 814-15.

132. Pub. L. No. 101-649, 104 Stat. 4978 (1990).

133. Morris, *supra* note 18, at 1318.

134. *Id.*

subjects a non-citizen to incarceration within the criminal justice system who would have only been subject to deportation (for the civil violation) previously.

A. *Criminalization of Immigration Violations That Were Previously Civil in Nature*

Many immigration-related activities have been newly criminalized in the past two decades. For example, since the Marriage Fraud Act of 1986 was passed, knowingly entering into a marriage to evade the immigration laws has been a felony, whereas previously it was a civil violation subjecting the alien to deportation only, not incarceration.

The IIRIRA criminalized many of the immigration-related activities to which civil penalties previously applied. The IIRIRA created new federal offenses for a range of activities including: voting in a federal election as a non-citizen;¹³⁵ knowingly making a false claim to citizenship to obtain a benefit or employment in the U.S. as a non-citizen;¹³⁶ failing to disclose, or concealing, one's role in the preparation of false documents to obtain immigration benefits;¹³⁷ and fleeing from an immigration checkpoint "in excess of the speed limit" regardless of your citizenship status.¹³⁸

B. *Enhanced Criminal Penalties for Existing Immigration-Related Crimes*

Although entering the U.S. without documentation has been a crime since 1952, it was prosecuted as a misdemeanor unless the alien entering without documentation had been previously excluded or deported.¹³⁹ If she had been previously excluded or deported, she could be charged with a felony. The Anti-Drug Abuse Act of 1988 increased the criminal penalty for illegal reentry after deportation or exclusion from up to two years to a maximum of five or ten years, depending upon whether the alien was previously deported for an aggravated felony or not.¹⁴⁰

Prior to the 1980's, wide scale detention of aliens by the INS was highly unusual. The conventional policy for dealing with undocumented aliens

135. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 216, 110 Stat. 3009-546 (1996). Ameliorative legislation enacted in 2000 clarified that criminal penalties would not be imposed under sections 215 or 216 if the parents of the voter are citizens, the voter permanently resided in the US prior to reaching age 16, or the voter reasonably believed that he of she was a US citizen at the time. *See* Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (2000).

136. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 215.

137. *Id.* at § 213.

138. *Id.* at § 108.

139. *Id.* at § 324 (amending § 276(a)(1) of the Immigration and Nationalization Act), codified at 8 U.S.C. § 1326(a)(1). *See* FRAGOMEN, *supra* note 12, at 1-10.

140. Pub. L. No. 100-690, § 7345, 102 Stat. 4181 (1988). In 1994, Section 13002 of the Violent Crime Control Act and Law Enforcement Act of 1994 increased the penalty to a maximum of 10 or 20 years. Pub. L. No. 103-322, 108 Stat. 1796 (codified at 8 USC § 1326 (1994)).

coming into the United States was exclusion at the border or deportation of those who had already crossed the border illegally, with liberal provision for bond, release on one's own recognizance, and other forms of parole.¹⁴¹ Those excludable aliens eligible for parole included detainees with serious medical conditions, pregnant women, juveniles, detainees on whose behalf relatives had filed a visa petition, witnesses in governmental proceedings and "aliens whose continued detention is not in the public interest."¹⁴² Of the undocumented, asylum seekers in particular were generally afforded relief from detention due to a broad recognition that their undocumented entry stemmed from duress—fear of persecution at the hands of their home government and poor prospects for government approval to leave the country and widespread domestic and international criticism of the incarceration of asylum seekers.¹⁴³ Aliens who were legally residing in the United States, but committed acts subjecting them to deportation, likewise had options other than detention. Yet today, immigration detainees represent the fastest growing segment of the jail population in the United States.¹⁴⁴ The INS contracts out to local and municipal jails the care, custody and control of approximately 60% of all its detainees.¹⁴⁵ A total of 5,532 detainees were held in INS custody in 1994.¹⁴⁶ In 1997, as the rapid increase in the number of federal and states inmates actually slowed – to 5.2% from a decade-long average of 7% growth – the number of detainees in INS custody rose to 16,000, representing a tripling over a period of four years.¹⁴⁷ In fiscal year 2000 alone, INS admitted more than a total of 188,000 aliens into detention.¹⁴⁸ In fiscal year 2001, the average daily detention population rose to approximately 20,000.¹⁴⁹

141. Although the law was apparently clear on its face that "every alien" seeking entry whose entitlement to enter was not established "clearly and beyond a doubt" to an examining immigration officer "shall be detained for further inquiry," in reality the discretionary authority of the Attorney General to parole, rather than deport, any applicant for admission for reason of emergency or public interest allowed for liberal provision of parole. INA § 235(b); INA § 212(d)(5); Margaret H. Taylor, *Detention and Related Issues*, in JUAN OSUNA, UNDERSTANDING THE 1996 IMMIGRATION ACT 5-2 (1st ed. 1997).

142. 8 C.F.R. § 212.5(b) (2003).

143. Taylor, *supra* note 141, at 5-2.

144. Non-U.S. citizens also represent a growing segment of the United States prison population, as more aliens are being prosecuted—and receiving longer sentences—for violating federal immigration laws.

145. William G. Paul, *America's Harsh and Unjust Immigration Laws*, USA TODAY MAG., July 1, 2000, available at http://www.findarticles.com/cf_o/m/272/2662-129/63668111/.

146. *Review of Department of Justice Immigration Detention Policies: Hearing Before the House Subcomm. on Immigration and Claims of the Comm. on the Judiciary*, 105th Cong. (2001) (statement of Joseph R. Greene, Acting Deputy Executive Associate Commissioner for Field Operations, Immigration and Naturalization Service).

147. Mike Clary and Patrick McDonnell, *Sentenced to a Life in Limbo*, L.A. TIMES, Sept. 9, 1998, at A1; Cheryl Little, *INS Detention in Florida*, 30 U. MIAMI INTER-AM. L. REV. 551 (1999).

148. *Review of Department of Justice Immigration Detention Policies, Hearing Before the House Subcomm. on Immigration and Claims of the Comm. on the Judiciary*, 107th Cong. (2001) (statement of Rep. Sheila Jackson Lee).

149. *Id.*

In the custody of the INS, these detainees are little more than prisoners. Detainees who may have done nothing more serious than come to the United States without documentation seeking asylum or who overstay their visas are housed with maximum-security criminal offenders in federal prisons and local county jails. Detainees are required to wear prison uniforms. They are transported in handcuffs and shackles, and disciplined harshly, even though their failure to conform to prison rules may result not from belligerence, but poor English comprehension and cultural differences.

C. *Reforms in Immigration Law After September 11th Continued the Enhanced Law Enforcement Agenda*

The horrific events that took place on September 11, 2001 recast the entire debate on immigration law enforcement. Prior to 9/11, the harsh detention and removal of criminal aliens brought about by the 1996 immigration reforms was roundly criticized for taking a "bright line" approach to solving the country's immigration problems by imposing disproportionately harsh—and in some cases, retroactive—penalties, and by inordinately relying upon detention and removal.¹⁵⁰ The *New York Times* ran a series of stories chronicling the harsh treatment and disproportionate punishment visited upon immigrants with minor criminal convictions in their pasts and long, established ties to the U.S.¹⁵¹ In addition to heavily relying upon detention and removal, the 1996 immigration reforms have been criticized for eliminating flexibility, reducing the potential for illegal immigration and leading to "outcomes that, while technically justified, simply do not fit the common sense of justice that most Americans have."¹⁵² Although the 1996 reforms included tools with which the U.S. government could combat terrorism,¹⁵³ their immediate impact was on the social welfare of classes of immigrants long considered problematic: illegal aliens, criminal aliens, refugees, welfare dependent immigrants, etc. Not until the terrorist attacks on the Pentagon and the World Trade Center on September 11, 2001 was terrorism widely perceived as a national crisis. From that point on, the tools Congress created to enhance immigration law enforcement would be aggressively deployed in the war on terror. In the weeks and months following the attacks on the World Trade Center and the Pentagon, the sympathetic stories of immigrants facing deportation and detention were completely overshadowed by the goal of

150. Bach, *supra* note 9, at 10.

151. Lena Williams, *A Law Aimed at Terrorists Hits Legal Immigrants*, N.Y. TIMES, July 17, 1996 at A1; Celia W. Dugger, *After Crime, She Made a New Life, but Now Faces Deportation*, N.Y. TIMES, Aug. 11, 1997 at A1; Deborah Sontag, *U.S. Deports Felons but Can't Keep Them Out*, N.Y. TIMES, Aug. 11, 1997 at A1.

152. Robert Bach, *supra* note 9, at 11. Mirta Ojito, *Change in Laws Sets Off Big Wave of Deportations*, N.Y. TIMES, Dec. 15, 1998 at A1.

153. Indeed the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), was symbolically enacted one year after the bombing of the federal building in Oklahoma City and designed to combat domestic and international terrorism.

avenging the attacks and preventing further terrorist strikes against the U.S. One has only to recall the preventive detention of over a thousand Muslims and men of Arab descent to understand the degree of human suffering the government was willing to tolerate in order to bring down the persons responsible for the attacks. At the time, few officials were willing to risk immigration policies aimed at less than total control.¹⁵⁴ An expeditious means to achieving total control was enhanced law enforcement.

The immigration reforms of the 1980's and 1990's paved the way for a greatly enhanced anti-terror-based law enforcement agenda after September 11th. The single most prominent law enforcement tool in the 1990's—detention—immediately rose to the forefront of the war on terror. The authority of immigration officials to detain non-citizens greatly facilitated the mass detention of Muslim and Arab aliens. Indeed although the investigation into the attacks constituted a search for criminal suspects, the immigration law enforcement system was the primary legal regime under which the investigation was conducted. This is due to the broader discretion immigration officials enjoy to arrest, detain and deport non-citizens with less judicial oversight and fewer substantive rights accruing to the arrest, detainee or deportee. Although this authority has traditionally been broad, the reforms of 1996 broadened this authority even further, and reduced judicial oversight even more. After the attacks, the Department of Justice initially undertook to protect national security by preventively detaining hundreds of foreign potential terrorist sympathizers. Later, it would focus more narrowly on detaining and prosecuting (or removing) both alien and citizen suspected terrorists.

The terrorist attacks on September 11, 2001 have had a profound impact on the direction of federal immigration law. They derailed an embryonic softening in political attitudes toward illegal immigration and highlighted the ease with which immigration law could once again be flouted and manipulated for malevolent purposes. Recall the much-publicized meeting between President Bush and Mexican President Vicente Fox regarding liberalization of U.S. policies toward Mexican immigration that took place just prior to the terrorist attacks of September 11th. On the table were a host of immigration reforms including a plan to allow some of the estimated 3.5 million Mexicans living in the U.S. illegally to earn permanent residency.¹⁵⁵ The possibility of sweeping

154. Indeed, the Inspector General issued a report criticizing Attorney General John Ashcroft's strategy of presuming all Muslim and Arab immigrants are guilty (of terrorism) until proven innocent. This strategy led to the apprehension, detention and mistreatment of hundreds of Muslim and Arab immigrants immediately following 9/11. See Eric Lichtblau, *Ashcroft Defends Detentions as Immigrants Recount Toll*, N.Y. TIMES, June 4, 2003, at A23 ("Many of the suspects were left in jail cells for weeks or months without being formally charged, with some suffering physical and verbal abuse from their jailers, investigators found, and few of the detainees proved to have ties to terrorists, investigators found.").

155. Ginger Thompson, *Mexico President Urges U.S. to Act Soon on Migrants*, N.Y. TIMES, Sept. 6, 2001, at A1; David E. Sanger, *Mexico's President Rewrites the Rules*, N.Y. TIMES, Sept. 8, 2001, at A1.

immigration reforms favoring undocumented Mexican workers reflected less of a break with the immigration law enforcement agenda set on the mid-1980's and more of a cleavage in the conservative political climate dead set against increased legal and illegal immigration based upon Bush's desire to woo Hispanic voters, many of whom contributed to his presidential victory. Congress was moving forward with Mexican immigration reforms that were expected to pass in the House of Representatives on September 11, 2001. The attacks derailed these initiatives and set in motion a series of new reforms that would reinforce, and ultimately dwarf, the law enforcement imperative in immigration law that gained momentum in the late 1980's that culminated in harsh AEDPA and IIRAIRA legislation in 1996. Furthermore, the attacks highlighted the danger presented not just by illegal immigrants but by *legal* immigrants to national security, as well as the country's vulnerability to the criminal terrorist activities of non-citizens. In the wake of the September 11th attacks, the executive and legislative branches of government made sweeping legal reforms that, *inter alia*, expanded the INS' detention power, provided law enforcement with new funding and powers to search, surveil and detain suspected terrorists, and ushered in an era of unprecedented cooperation between immigration, state and federal law enforcement. Ultimately, in the name of fostering this cooperation, the INS would be dismantled and absorbed into the Department of Homeland Security.

Immediately after September 11th, the government relied heavily upon the combined power and discretion of immigrations officials and criminal prosecutors to preventively detain nearly 1200 men of Arab descent in an effort to paralyze further acts of terror by potential terrorist sympathizers. With no express legal authority to preventively detain for acts of terrorism, the government utilized the near complete discretion of the INS to hold non-citizens on suspicion of immigration violations.¹⁵⁶ Attorney General John Ashcroft revised the INS' detention rules to expand the government's power to detain aliens. Whereas previously the INS had only 24 hours to either release detained immigrants or charge them with a crime or with violating the terms of their visa, under its new powers, the agency would have 48 hours to decide whether to release or charge a detained alien. However, if the agency could claim emergency or extraordinary circumstances, the 48-hour deadline was waived and the alien held for an additional "reasonable period of time" without charges. In addition to enhanced INS authority, the government further relied upon the broad authority of federal prosecutors over persons defined as "material witnesses" to detain potential

156. William Glaberson, *After the Attacks: Legal Constraints; Investigators Explore Boundaries Of Everything the Law Allows*, N.Y. TIMES, Sept. 17, 2001, at A2.

terrorist sympathizers.¹⁵⁷

Among the provisions of the Act strengthening cooperation between immigration and other law enforcement agencies, Section 403 gives the INS access to the files of the National Crime Information Center for the purpose of verifying the criminal histories of immigrant and non-immigrant aliens. It further mandates the development of technology that will operate across law enforcement agencies and across electronic platforms to ensure that there will be a cost-effective, efficient and fully-integrated means to share law enforcement and intelligence information for the verification of criminal histories.

V. THE NEW PENOLOGY AT WORK IN THE REGULATION OF NON-CITIZENS

Over a decade ago, Feeley and Simon first discerned a new strategic formation within the field of criminal sanctions and correctional supervision. They called it the "new penology." They identified three areas of transformation in penal processes that characterize the new penology: the emergence of new discourses; the formation of new objectives; and new techniques.¹⁵⁸ Simon expanded these initial theoretical insights into a broader theory of the role crime increasingly plays in self-government, or in the exercise of power over others in a variety of contexts, such as family, work, schools, businesses and professional organizations. He labeled this phenomenon "governing through crime," and went on to explain how it fits within a larger crisis of social liberal governmentality that began in the 1970's when social liberal ("New Deal") strategies of managing social change were rejected by conservative leaders, such as Reagan and Thatcher, seeking new processes of rule and governance.¹⁵⁹

This section examines aspects of Simon's and other's theories about the transformation of penal processes and explains how the new penology is at work within recent reforms in the legal regulation of non-U.S. citizens. After discussing the new penology within harsh reforms aimed at removing criminal aliens from the country, I will go on to describe how the War on Terrorism and its powerful new objective of protecting national security has continued and accelerated the governance of non-citizens through crime,

157. *Id.* Under federal law, a person can be held as a material witness if there is probable cause to believe the person has information that could be important to an investigation and it may be difficult to assure that the person will be available to testify. Material witness warrants lend themselves to this particular application because of the lighter burden of demonstrating that a person has information than demonstrating reasonable suspicion that he or she is involved in a terrorist conspiracy. Additionally, the international nature of the Al Qaeda terrorist network made it easy for prosecutors to demonstrate risk of flight.

158. Jonathan Simon, *The Ideological Effects of Actuarial Practices*, 22 LAW & SOC'Y REV. 771 (1988); Malcolm Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 4 (1992).

159. Jonathan Simon, *Sanctioning Government: Explaining America's Severity Revolution*, 56 U. MIAMI L. REV. 217 (2001).

while simultaneously diverging from the objectives and discourses that characterize the new penology.

Any discussion of how the new penology functions within recent immigration policy reforms must draw upon the theoretical insights in an earlier work by Jonathan Simon on the significance of immigration imprisonment as an aspect of the broader transformation of penality in the United States. *Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States*¹⁶⁰ is the rare article that links the resurgent practice of imprisoning criminal aliens and refugees to mass incarceration within the penal system. Feeley situates the renewed practice of systematically imprisoning immigrants within emerging strategies for governing “global cities” and the continuing digression of penal practices from the progressive spirit of modernity.

Simon’s observations provide a frame of reference, as well as points of contrast, for the analysis in this paper of recent immigration reforms taking more punitive approaches to criminal aliens, refugees and most recently, communities identified with terrorism. First, Simon observes that the promotion of Haitian refugees as a “dangerous class” harkens back to monarchical practices of maintaining social order that are distinctly anti-democratic. Consistent with this notion, I suggest that “criminal aliens” have likewise been constructed as a dangerous class, similar to the Nineteenth Century application of criminal stereotypes to Southern and Eastern European ethnic groups to justify their imprisonment.¹⁶¹ Furthermore, I contend that the war on terrorism has constructed a new “dangerous class” consisting of Muslims, Arab nationals and Arab Americans.¹⁶²

Second, Simon observes that immigration detention is, in part, a response to a crisis in urban social order; that it governs target populations of “dangerous” non-U.S. citizens in the context of a globalized economy destabilized by transnational flows of capital and labor.¹⁶³ Simon’s analysis focuses on the detention of refugees in Miami, an important site of transnational impact and urban crisis, as a technology of governance in a globalized

160. Jonathan Simon, *Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States*, 10 PUBLIC CULTURE 3, 577-606 (1998).

161. *Id.* at 601. For sociological literature documenting the persistence of the stereotype of the criminal immigrant, see generally Ramiro Martinez and Matthew Lee, *On Immigration and Crime*, in THE NATURE OF CRIME: CONTINUITY AND CHANGE, 1 CRIM. JUST. 485-524 (Gary LaFree ed., 2000); Tony Waters, CRIME AND IMMIGRANT YOUTH (1999); and Franco Ferracuti, *European Migration and Crime*, in CRIME AND CULTURE: ESSAYS IN HONOR OF THORSTEN SELLIN 189-219 (Marvin Wolfgang et al. eds., 1968).

162. In contrast to criminal aliens, whose perceived “dangerousness” harkens back to widespread anxiety about (and fear of) the perceived criminality of an earlier group of immigrants (Nineteenth Century Southern European immigrants), this newest “dangerous class” ignores distinctions of citizenship. Arab nationals, Muslims and Arab Americans (sometimes referred to as “American born” Arabs) alike are suspected of possible links to terrorism and for their “foreignness.” In contrast to the perceived dangerousness of criminal aliens, this construction of dangerousness blurs the boundary between citizens and immigrants.

163. Simon, *supra* note 160, at 603.

economy prior to the declaration of war on terrorism. In contrast, my analysis of immigration reforms treating illegal aliens, refugees, criminal aliens and terror-suspect communities more punitively is not limited to detention or to a particular city. I contend that these punitive reforms have displaced social liberal governing strategies that were in crisis with a governing strategy that weeds out certain undesirable non-citizens (and increasingly, citizens) through surveillance, fear, commodification and incarceration.

A. *Governing through Crime*

To the extent that a crime fighting agenda has redefined the priorities of the immigration system in the past twenty years, immigration law is “governing through crime.” Within the broad reconfiguration of immigration policies around crime control, several themes stand out: (1) the enormous growth of the infrastructure of immigration law enforcement; (2) the growing percentage of non-citizens under penal supervision; (3) the prioritization of criminally-constituted subjects as targets for immigration law enforcement; and (4) the simultaneous growth in the numbers of non-citizens admitted to and deported from the United States.

1. *Growth of the infrastructure of immigration law enforcement*

The immigration system has grown dramatically in the past twenty years. At a time in which Congress was slashing federal spending, the INS grew rapidly as Congress appropriated larger and larger sums to apprehending, imprisoning and removing illegal aliens and aliens with past criminal convictions.¹⁶⁴ Between 1993 and 2001, the INS budget grew more than 230 percent—from \$1.5 billion to \$5.0 billion.¹⁶⁵ Most of the growth occurred in law enforcement. From 1990 to 2001, spending for enforcement programs grew from \$933 million to \$3.1 billion, nearly five times as much as spending for naturalization and other immigrant services.¹⁶⁶ Staffing for law enforcement activities—border control in particular—likewise grew dramatically, more than doubling in this same period of time from 11,418 to 23,364.¹⁶⁷ The INS designated a substantial amount of its increased funding for expanding its detention capacity twofold, and likewise doubling the number of employ-

164. ANDREAS, *supra* note 72, at 89-91 (describing the aggressive and unprecedented expansion of the INS under the Clinton administration, emphasizing the fact that the build up ran counter to the political devolution—limitations on federal spending and greater decision-making power at the state level—that was popular at the time).

165. MICHAEL WELCH, *DETAINED: IMMIGRATION LAWS AND THE EXPANDING INS JAIL COMPLEX* 47 (2002).

166. *Id.* Welch points out that law enforcement dominated increases in INS full-time, permanent staffing. Whereas the total number of INS employees increased by 79 percent between 1993 and 2001, most of the growth occurred in enforcement programs, such as Border Patrol where staffing increased 159%, and the detention and deportation sector. *Id.*

167. *Id.*

ees involved in confining and deporting non-citizens.¹⁶⁸ In 1998, with a billion dollar budget for the detention and deportation of immigrants and over 15,000 officers authorized to carry weapons and make arrests (more than the Federal Bureau of Investigation, the Bureau of Prisons, the Customs Service or the Drug Enforcement Administration) the INS became the largest federal law enforcement agency.¹⁶⁹

Since the terrorist attacks of September 11th, the growth in government spending on screening non-citizens for connections to terrorism has been profound. New appropriations fund a variety of costly, technologically sophisticated programs, such as the National Security Entry Exit Registration System (NSEERS), that require men 16 years and older who are citizens of some 25 countries (all predominantly Muslim countries with the exception of one) to be fingerprinted and photographed by the INS;¹⁷⁰ SEVIS (the foreign student tracking system to verify compliance with student visas);¹⁷¹ and IBIS (the Interagency Border Inspection System) that has automated screening of non-citizens at U.S. ports-of-entry by making available to INS and customs officers in the field an integrated database of known and suspected terrorists in the United States.¹⁷²

2. *The growing percentage of non-citizens under penal supervision*

As the immigration system has shifted away from bond and parole by mandating imprisonment for illegal and criminal aliens, more and more non-U.S. citizens are being confined in jails and federal prisons across the country. Currently, immigration detainees represent the fastest growing segment of the jail population in the United States.¹⁷³

168. *Id.*

169. Ojito, *supra* note 152.

170. In February 2003, Congress allocated \$362 million to fund the first year of the program's operation in an omnibus appropriations bill. George Lardner, Jr., *Congress Funds INS Registration System But Demands Details*, WASH. POST, Feb. 15, 2003, at A18.

171. Designed to replace the INS' paper-based system for tracking and monitoring nearly 1 million foreign students, the internet-based computer system which over 3000 schools are mandated by Congress to use to cost \$37 million. Marcia Slacum Greene, *Computer Problems Slow Tracking of Foreign Students*, WASH. POST, Mar. 26, 2003, at A6.

172. These programs were all mandated by the USA PATRIOT Act (Pub. L. No. 107-56) which became effective on October 26, 2001, and the Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, which became effective on May 14, 2002.

173. In the custody of the INS, these detainees are little more than prisoners. Detainees who may have done nothing more serious than come to the United States without documentation seeking asylum or who overstay their visas are housed with maximum-security criminal offenders in federal prisons and local county jails. Detainees are required to wear prison uniforms. They are transported in handcuffs and shackles, and disciplined harshly, even though their failure to conform to prison rules may result not from belligerence, but poor English comprehension and cultural ignorance.

While the conditions under which detainees are confined may resemble that of their criminal counterparts, they are, in fact, far worse. Detainees have fewer due process rights than are granted to American prisoners. Aliens have no right to court-appointed counsel. This means that if a detainee cannot afford legal services, he must go without. In fact, the Executive Office for Immigration Review has reported that less than 11% of detainees receive attorney assistance. Kerwin, *supra* note 117. Detainees are also cut off from services simply because they do not speak the language. INS

The immigration system contracts out to local and municipal jails the care, custody and control of approximately 60% of all its detainees,¹⁷⁴ and spends more than a third of its \$900 million detention budget on renting cells – most of which are in remote, rural county jails – where the costs are low and the availability of beds is high. Fifty-five hundred detainees were held in INS custody in 1994. In 1997, as the rapid increase in the number of federal and state inmates actually slowed – to 5.2% from a decade-long average of 7% growth – the number of detainees in INS custody rose to 16,000, representing a tripling over a period of five years.¹⁷⁵ In 2001, the daily detention population of INS detainees was 22,000, contributing to an annual total of about 200,000 aliens passing through INS custody in 2001.

3. *Prioritization of criminally-constituted subjects as targets for immigration law enforcement*

The immigration system governs through crime when it targets certain criminally constituted subjects for confinement and expulsion. I use the term “criminally constituted” intentionally. Many of the individuals targeted for detention and deportation have tenuous connections to crime that are given greater weight as crime becomes a mode of governing immigrants. These subjects include asylum seekers who falsify their immigration documents;¹⁷⁶ workers who cross the border without authorization; former felons or even misdemeanants; and more recently visa overstayers¹⁷⁷ and men of Arab descent—even U.S. citizens—who are criminally suspicious only because they share the same ethnicity as the notorious 9/11 hijackers. These subjects have all been made the targets of increased law enforcement activity as a result of changing modes of governmentality. Illegal immigrants, perceived more sympathetically in the 1960’s and 1970’s as poor people making reasonably appropriate decisions to assure their families’ welfare, were

usually only provides detainees with translators in the event of an emergency or a medical examination, and often these are provided by phone. Wendy Young, *U.S. Detention of Women and Children Asylum Seekers: A Violation of Human Rights*, 30 U. MIAMI INTER-AM. L. REV. 577, 586 (1999). The few services detainees do have access to are threatened by the explosion in the number of INS detainees. INS is sending more aliens to detention centers that are already overcrowded and understaffed.

174. William G. Paul, *America’s Harsh and Unjust Immigration Laws*, USA TODAY MAG., July 1, 2000, available at http://www.findarticles.com/cf_o/m/272/2662-129/6366811/.

175. Mike Clary & Patrick McDonnell, *Sentenced to a Life in Limbo*, L.A. TIMES, Sept. 9, 1998, at A1; Cheryl Little, *INS Detention in Florida*, 30 U. MIAMI INTER-AM. L. REV. 551 (1999).

176. See Mailman, *supra* note 24, at 763 (noting that federal prosecutors in South Florida have criminally charged dozens of recently arrived asylum seekers for entering the US with false documents).

177. Although cracking down on visa overstayers has been a prominent post-9/11 theme, visa overstayers were the subject of bureaucratic crisis as early as 1979 when President Carter attempted to expel Iranian students living in the United States that had overstayed their visas. Then, as after 9/11, the inability of the immigration system to track or even identify nonresident aliens who overstayed their visas caused alarm, and gave rise to calls for reform. MORRIS, *supra* note 8, at 112-113.

ultimately victims of the cultural backlash that occurred when the social liberal mode of governmentality was de-legitimated. Criminal aliens, including many lawful permanent residents who have resided in the United States since childhood and whose criminal convictions are far in the past, are likewise victims of a change in governmentality that increasingly relies upon the benefits of criminal severity.¹⁷⁸ Finally, the criminal stereotyping, preventive detention and special registration of alien men who are Muslim or of Arab descent can be seen as a response to the overwhelming perception of government incompetence in failing to detect and diffuse the terrorist plot for massive destruction on September 11th and then subsequently reissuing visas for several of the dead hijackers only a few months later.¹⁷⁹

4. *Simultaneous growth in the numbers of non-citizens admitted to and deported from the United States*

One of the great ironies of the current system of immigration regulation is that the government is admitting record numbers of non-citizens into the country at the same time it is deporting them in record numbers,¹⁸⁰ largely based upon their attributed criminal status. This suggests that immigration law governs through crime in a way that relies upon, rather than seeks to eliminate, illegal immigration and the criminal alien population.

This reliance upon illegal immigration and criminal aliens contrasts sharply with the role of the immigration system as it was understood for many years prior to the reforms of the 1980's and 1990's. A centuries-old paradigm of immigration understood the role of the immigration system as excluding undesirable foreigners seeking to enter the United States at the border, and admitting only those foreigners (excepting those admitted on non-immigrant visas) whose professional skills, business opportunities, family ties, wealth, etc., made them desirable. Desirable immigrants would be provided immigration services and support to live, work and eventually assimilate into the vast American middle-class, while less desirable immigrants would be denied admission and turned away at the border.

However, this model did not anticipate a large, persistent population of illegal aliens. Since the demise of the social liberal state in the early 1980's, a very different understanding of the goals of the immigration system has

178. Jonathan Simon, *Sanctioning Government: Explaining America's Severity Revolution*, 56 U. MIAMI L. REV. 217 (2001) (explaining the severity revolution as a mode of governance).

179. Dan Eggen & Mary Beth Sheridan, *Terrorist Pilots' Student Visas Arrive; Officials Blame 'Antiquated' System for Delay of Paperwork*, WASH. POST, Mar. 13, 2002, at A1.

180. Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1891-92 (2000) ("The United States presents the rather paradoxical picture of a nation-state that has expanded both the number of people whom it admits and the number of people whom it expels. The concern, it seems, is not so much with the quantity of immigrants as with the personal qualities. Deportation policy, in particular, has aimed increasingly at permanently "cleansing" our society of those with undesirable qualities, especially criminal behavior.").

emerged. Among other signs, Proposition 187 clearly signaled American disillusion with providing social services to all immigrants present within the United States. The desire to retract social support for a disfavored class of immigrants (illegal immigrants) also demonstrated a skepticism that these immigrants would ever assimilate or make a positive contribution to the economy or culture of the United States. This new (post-) social welfare policy toward illegal (and ultimately *all* undesirable immigrants) has reformed the role of the immigration system drastically.

The immigration system largely abandoned the goal of eliminating illegal immigration and focused instead on purging troublesome immigrants on the back end of the immigration process (e.g., when an illegal alien is discovered at a sobriety checkpoint, or a “criminal” alien is released from correctional custody), while leaving the majority of undocumented aliens to eke out an existence in an environment that exploits their labor and their vulnerability to detention while still allowing them to provide cheap services to middle-class consumers.¹⁸¹

5. *From individualized to group-based assessments of dangerousness*

Changes in the determination of bond and parole for criminal aliens ordered deported furnishes a clear example of the shift away from individualized assessment to group-based assessments of dangerousness. Prior to 1988, when the category of aggravated felon was created, criminal aliens ordered deported were liberally granted bond, unless they were determined to threaten national security, be likely to abscond or pose high bail risks.¹⁸² In order to determine the appropriateness of bail, the immigration judge examined the following criteria: local family ties; prior arrests, convictions, and appearances at hearings; employment or unemployment; membership in community organizations; manner of entry and length of time in the U.S.; immoral acts or participation in subversive activities; and financial ability to post bond.¹⁸³ These factors assisted immigration judges in assessing the risk individual criminal aliens presented to the community.

The advent of mandatory detention for all criminal aliens classified as “aggravated felons” eliminated the consideration of individual equities in bond determinations.¹⁸⁴ The Anti-Drug Abuse Act of 1988 established a presumption against release on bond for aggravated felons, a group that has subsequently been so broadly redefined as to encompass most non-citizens with past felony (or in some cases misdemeanor) convic-

181. Eve Epstein, *The Cost of Easy Living*, BOS. GLOBE, MAY 11, 1997, at E5. However, since 9/11, there has been a significant return to more classical, conservative notions of immigration at evidenced by heavy reliance by judges in recent national security-related immigration cases on the doctrine of the conservative, foundational immigration cases of the 1800’s.

182. IRA KURZBAN, KURZBAN’S IMMIGRATION LAW SOURCEBOOK 49, at 218 (8th ed. 2002).

183. *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976).

184. 8 U.S.C. § 1252(a)(2); INA § 236(c).

tions. AEDPA went one step further when it eliminated any relief from detention for criminal aliens who committed aggravated felonies, drug crimes, firearm offenses, miscellaneous crimes, or two crimes of moral turpitude where the potential sentence equaled or exceeded one year.¹⁸⁵ Therefore, after 1996, the consideration of individual equities in bond determinations for most criminal aliens was abandoned, in favor of aggregate assessments of risk based upon the categorization of an alien as an “aggravated felon.”

6. *Language that classifies dangerous subpopulations*

Although the actuarial language is not as prominent in the new discourse of immigration as in crime, increasingly immigration terminology imports crime lingo that reconfigures non-citizens as criminals. Two examples stand out. The first is the prominence of the label “criminal alien.” The second is the expansive use of the term “aggravated felon”.

(a) *Criminal aliens*

The term “criminal alien” has achieved great prominence in the increasingly crime-defined system of immigration regulation. Yet just over twenty-five years ago, the term was not common. For example, in the 1973 edition of Wasserman’s treatise on U.S. immigration law, the subject heading for non-citizens deportable by reason of a criminal conviction is “convicted aliens.”¹⁸⁶ Similarly the subject heading “convicted aliens” precedes the section on non-citizens inadmissible by reason of a criminal conviction. In neither section is the term “criminal alien” used. The reference to the “conviction” rather than the “criminality” of the alien is significant. The term “criminal alien” is more pejorative. It implies that the subject has an enduring criminal nature. In contrast, the term “convicted alien” emphasizes the past nature of the criminal conviction, and more accurately reflects the legal status of the subject.

By emphasizing the criminality of the subject, the deportation, inadmission or other harsh treatment of the subject is justified by the continuing nature of the threat presented by the “criminal alien.” In contrast to the convicted alien whose riskiness is presumed to have been extinguished or at least treated by incarceration, probation or some other form of criminal justice supervision, the term criminal alien redefined the same subject as inherently criminal, and therefore presenting an ongoing risk to public safety that requires some intervention by law enforcement.

185. 8 U.S.C. § 1182 (2003).

186. See generally JACK WASSERMAN, IMMIGRATION LAW & PRACTICE (2d ed. 1973).

The term “criminal alien” is often used as if it denoted a current criminal threat.¹⁸⁷ Law enforcement is justified on that basis, rather than on the ground that they are non-citizens who are undesirable due to their criminal past and therefore, deportable.

(b) *Aggravated felons*

Aggravated felons are a subgroup of aliens with criminal convictions in their past. They have been convicted of crimes that are classified as “aggravated felonies.” The term “aggravated felony” did not exist before 1988, when the Anti-Drug Abuse Act of 1988 created a new category of crimes for which criminal aliens could be deported. Initially, the term referred to non-citizens who had convictions for serious crimes including murder, drug trafficking and firearms trafficking. In addition, aggravated felons were deprived of forms of relief from deportation that other criminal aliens could seek based upon individual, extenuating circumstances. However, in subsequent legislation, the term “aggravated felon” was repeatedly expanded to include more and more minor crimes, and since 1996, the category of aggravated felony has been applied retroactively to crimes, many of which do not subject non-citizens to deportation at the time of conviction.

The term “aggravated felon” illustrates how immigration law has adopted a new, exaggerated classification of non-citizens with convictions in their past that is rooted in the conceptions of group dangerousness. Ironically, the term is now more of a creature of *immigration* law than of *criminal* law. Once reconfigured as dangerous in excess even of the meaning of “aggravation” in the criminal law sense, more punitive treatment is justified.

B. *New Objectives*

A discourse that focuses on categories and sub-populations rather than individuals also serves different objectives than one based on moral or

187. The enduring nature of the criminal alien’s dangerousness is evident in something as mundane as the language employed in a few scant lines of prose on the website for the police department of Dalton, Georgia. Dalton Police Department Website, at <http://police.citydalton.net/insTaskForce.htm> (last visited Feb. 3, 2003). The webpage describes a joint task force venture between the City of Dalton (“the carpet capital [*sic*] of the world” according to the logo on the page) and the local INS office. The site describes the main purpose of the task force as “the investigation and prosecution of criminal aliens in the Dalton area.” After assuring the reader that the identities of those reporting illegal aliens and criminal aliens will be held in confidence, the description of the task force ends with the assurance that “the Criminal Alien Task Force appreciates your assistance in the *fight against crime involving aliens*.” From this language, one gets no sense of the non-citizen with a criminal conviction in her past, but instead gets a very keen sense of the criminal alien as an ongoing threat to the safety of the community in Dalton, Georgia. The website also fails to distinguish illegal aliens from criminal aliens, thus implying that all are subject to deportation when, in fact, only some criminal aliens are deportable. So, in effect, the term “criminal alien” categorizes a broad population as a present law enforcement risk despite the fact that (1) a past conviction does not predict present dangerousness, and (2) that some aliens with past convictions (mostly misdemeanants) are not subject to deportation by the INS, much less criminally-assisted civil law enforcement by local police.

clinical judgments about individuals. Feeley and Simon observed that the new penology evidences a shift away from the goal of normalizing criminal offenders toward the goal of managing them. Replacing the goal of treatment or rehabilitation of the criminally deviant, is the new penological goal of managing deviance that is presumed. As Feeley and Simon note, this kind of pessimism insulates the criminal justice system from criticism based upon its failure to meet external performance measures grounded in “messy, hard-to-control” social and economic factors.¹⁸⁸ In contrast, the new penology relies upon performance measures that are internally generated, and therefore far easier to control such as conformity with “technocratic” parole conditions. Feeley and Simon cite waning concern over recidivism as paradigmatic of the new penology at work. Whereas parole revocation was traditionally a measure of correctional failure (i.e., failed rehabilitation and reintegration of the offender into the community), it is increasingly viewed as a measure of success because it functions to bring chronic offenders back under the control of the correctional system.¹⁸⁹

The objectives of the immigration system have similarly been redefined. They are now closely aligned with the new objectives of the criminal justice system: managing dangerous populations, and doing so through internally generated performance measures that provide greater insulation from criticism based on the system’s failure to meet messy, socially- and economically-based performance measures imposed from without. Examples of these new objectives within immigration law abound. They include the abandonment of (1) assimilation and (2) the elimination of illegal entry as key immigration objectives, as well as (3) the targeting of legal aliens (in addition to illegal immigrants and criminal aliens) as a “dangerous” population to be managed.

1. *Abandoning assimilation as a key objective of immigration regulation*

The evolution of U.S. immigration policy since its inception is distinct from the historical narrative supporting the rise of rehabilitation and clinical treatment of criminal offenders. Yet there are notable similarities. *Assimilating* the immigrant¹⁹⁰ has long served as the functional equivalent of *rehabilitating* the criminal offender. Just as the modern penal subject was presumed to undergo a process of personal transformation in the penitentiary, so too was the immigrant traditionally expected to assimilate to American cultural and social traditions and, in doing so, transform herself from an unknown,

188. Feeley & Simon, *supra* note 158, at 456.

189. *Id.* at 455.

190. When I speak of assimilating the immigrant, I am referring to a particular model of assimilation—melting pot assimilation—that correlates to theories of racial assimilation met with skepticism today, that presume a kind of natural progression by which immigrants abandon ties to their native land by adopting U.S. cultural and social values, dispersing themselves among “Americans” and mastering and using the English language almost exclusively. In completing this progression the assumption was that the immigrant could work his way up the ladder to success.

potentially dangerous outsider with foreign loyalties to a culturally familiar, non-threatening member of the national community. Measures of the success of this model of immigration (and of the immigrant's personal transformation) included the immigrant's ability and willingness to speak and write in English, Anglicization of the spelling of one's name, residential dispersion among non-immigrants and in some cases, religious conversion.

However, after the 1965 Act abolished the national origins quota system and the new preference system reconfigured the basis upon which immigrants were admitted to the U.S., many more immigrants were admitted to the U.S. The immigrants of the 1960's and beyond were racially and ethnically distinct from the vast majority of immigrants of the preceding era. Southeast Asian refugees clustered in California and other West Coast regions, Mexican immigrants demanded bilingual education and Cuban refugees dug a political enclave in Miami, Florida. As they did so, the public grew increasingly skeptical that the goal of assimilating these new immigrants was achievable. The goal of assimilation was made more elusive by "messy, hard-to-control" social and economic factors that had as much to do with characteristics of the immigrant groups themselves as changes that had occurred within U.S. culture and society.

Since the mid-1980's, the immigration system has progressively abandoned the objective of assimilation, assumed the indigestibility of recent immigrants and refugees, and focused increasingly upon the task of managing inassimilable and therefore presumptively unknowable, unruly and dangerous immigrants. Like the criminal justice system, the immigration system has defaulted to methods of managing immigrants whose success is judged by internally generated performance measures that are easier to control.

First, immigrants are increasingly managed through incapacitation. The INS has adopted incapacitation, and abandoned deterrence, as a strategy for dealing with illegal aliens and non-citizens with past criminal convictions. In doing so, it overwhelmingly relies upon "body counts" (numbers of non-citizens in custody) to measure the success of immigration law enforcement.¹⁹¹ Consistent with the new penology, these body counts are internally generated performance measures unhinged from the messy, hard-to-control factors such as economic incentives to attempt reentry in spite of the high cost of failure or social incentives to reunite with family members even at the risk of re-imprisonment.

Feeley and Simon assert that the criminal justice system abandoned the goal of eliminating crime in favor of managing the risk that criminal deviants

191. Criticizing the INS's exclusive focus on incapacitation, Robert Bach, former INS commissioner contends that the proper policy response "should focus as much on recidivism and efforts to prevent it as it does on maximizing 'body counts' that too frequently and easily become performance measures for enforcement activities." Bach, *supra*, note 9, at 11.

present and making it tolerable through systemic coordination. Likewise, changes in legal responses to illegal border crossing and unauthorized reentry attest to a profound change in the objectives of immigration law and policy.

2. *Abandoning the elimination of illegal entry and reentry as a key objective of immigration regulation*

(a) *Illegal entry*

In the decade preceding September 11, 2001, the inability of the immigration system to stop illegal border crossing was virtually conceded. In the face of this failure, the immigration system embraced the more realistic objective of managing the risk that illegal aliens present and making the risk tolerable through systematic coordination. One example of this is California's Proposition 187. Although at first glance the objective of Proposition 187—a product of a populist anti-immigrant political groundswell across the Western States—appears to be the inhibition of illegal border crossing in the Southwest, astute observers have discerned a different objective. As Eve Epstein observed in a three-part series on illegal immigration for the *Boston Globe*, even as Californians voted overwhelmingly to deny public services to undocumented workers and their families, they were deeply invested in the amenities immigrant labor (much of it undocumented) provided: cheap car washes, cheap valet parking, cheap house cleaners, cheap manicures, cheap childcare, and cheap gardeners. As economist Paul Krugman noted, Proposition 187 was aimed not so much at excluding or expelling the undocumented as keeping the cost of the amenities provided by undocumented laborers low.¹⁹² Michael Peter Smith, a University of California professor who studied the fallout from Proposition 187 commented that Californians wanted to have it both ways: to allow as much cheap labor into the country as possible, but at all costs to avoid reproducing any social welfare benefits, including public education.¹⁹³ This is consistent with Daniel Kanstroom's observation about the punitive immigration regime that the United States is simultaneously admitting and removing more non-citizens than ever before.¹⁹⁴

(b) *Illegal reentry*

Changes in the legal consequences of unauthorized reentry since 1996 similarly attest to a profound shift in the objectives of the immigration system. Unauthorized re-entry of aliens who were previously deported is a problem that took on increased urgency in the mid-1990's as the volume of

192. "Prop. 187 does not directly push immigrants out. It simply says we will not spend any money on them, but an El Salvadoran can still cut your grass even if his children are illiterate." Epstein, *supra* note 181 (quoting Paul Krugman).

193. *Id.*

194. See Kanstroom, *supra* note 22.

non-citizens deported from the United States rose dramatically. However, the significance of high rates of unauthorized reentry has taken on a new meaning. Before the mid-1990's when eliminating illegal immigration was a demonstrable goal of the immigration system, the apprehension of large numbers of illegal reentrants (many of whom were subject only to a civil order of deportation by the INS at the time) was considered a sign of failure. However, in 1996, illegal reentry became a federal offense punishable by stiff criminal sentences.¹⁹⁵ Now a high frequency of prosecutions for illegal reentry, and a rising population of illegal immigrants in federal prisons, is considered evidence of the effectiveness of imprisonment as a means of containing the threat illegal reentrants present to national security.

3. *Embracing heightened scrutiny of legal immigrants*

The events of September 11th reinforced the shift in the objectives of immigration regulation. The terrorist attacks by Al-Qaeda members on September 11th focused scrutiny on additional categories of non-U.S. citizens. After 9/11, not only were criminal aliens and refugees being managed, but for the first time, legal aliens—non-immigrant visa holders, foreign students, and others—were seen as presenting a grave risk to national security. More specifically, legal immigrants from Arab countries with large Muslim populations. Indeed, the preventive detention of over 1200 immigrants of Arab descent in jails and federal lockup facilities across the country without regard for the legality or illegality of their presence—in other words, criminal law enforcement agents assisting INS agents in apprehending “suspicious” immigrants, many of whom were lawfully in the country and had committed neither a crime nor violated the civil law of immigration—treated immigrants of Arab descent as an undifferentiated threat to national security (on the basis of their ethnic ancestry). Special registration has carried it one step further by requiring non-immigrant visitors from a range of countries linked to terrorism to be fingerprinted and photographed by the INS.

C. *New Techniques*

Finally, the new penology replaces traditional techniques of clinically treating and rehabilitating criminal deviance with more cost-effective forms

195. Non-citizens who reenter the United States after exclusion, deportation or removal are subject to a sentence of two years in federal prison and a \$1000 fine. 8 U.S.C. § 1326(a). For criminal aliens the penalty is substantially greater. Reentry after the commission of three or more misdemeanors involving drugs, crimes against the person or both, or after the commission of a felony subjects the criminal alien to a 10-year sentence. 8 U.S.C. § 1326(b)(1). For aggravated felons, the penalty is much more severe. Reentry of a non-citizen after conviction of an aggravated felony is punishable by 20 years in prison. 8 U.S.C. § 1326(b)(2). And finally, the most severe reentry penalty is reserved for criminal aliens who are excluded, deported or removed as alien terrorists. They are subject to a 10-year non-concurrent penalty. 8 U.S.C. § 1326(b)(3)-(4).

of custody and control that optimize the identification and classification of risk. Paradigmatic of these new techniques is the rise of incapacitation as the predominant model of punishment; selective incapacitation in particular. Consistent with the pessimism that no real hope exists for reforming criminal offenders, incapacitation holds no ambition more complex than detaining offenders for a time and in doing such forestalling the inevitable resumption of criminal activity upon release. Selective incapacitation simply pegs the length of detention to a level of risk determined on the basis of the nature of the criminal offense (rather than the character or social circumstances of the offender).

The shift toward wide scale detention of many different classes of non-U.S. citizens, and their subsequent deportation, has received the most attention among the recent harsh immigration reforms. The heavy reliance upon confinement and expulsion exemplifies the new penology on several levels. It attests to a loss of faith in other techniques for preventing immigration violations such as deterrence and rehabilitation. The INS's broad policy of confinement followed by expulsion from the country attests to the increasing importance of incapacitation and a declining emphasis on recidivism and its prevention. As Robert Bach, former commissioner of the INS points out in the context of detention and removal of criminal aliens, "removal from the streets to detention or from the US to a home country does not necessarily solve the problem."¹⁹⁶ Once abroad there are strong incentives for the deported criminal alien to attempt re-entry (an immigration violation that was criminalized by IIRAIRA and now subjects the violator to criminal imprisonment). Indeed, illegal aliens whose only "crime" is illegal re-entry become acclimated to crime and prison culture through their experience of imprisonment, and therefore more likely to resort to serious crimes (as opposed to criminalized immigration violations) upon release.

VI. THE NEW PENOLOGY AT WORK IN THE WAR ON TERROR

The focus of this paper is the new penology as it functions within recent immigration reforms. Concern about terrorism has been an undeniable and consistent factor in the adoption of many of these recent reforms, but most particularly salient in the reforms adopted after September 11, 2001. Yet the full consideration of terrorism and its implications for the new penology is beyond the scope of this Article. Thus, I will offer only a survey of some of the key issues that arise when one views anti-terrorism legislation and policies adopted after 9/11 through the lens of the new penology.

Anti-terrorism initiatives both reproduce and reconfigure the new penology. The War on Terror was launched from the platform of a hybrid crime/immigration system that was developed to control illegal immigrants

196. Bach, *supra* note 9, at 11.

and criminal aliens. As I developed earlier in this paper, the hybrid crime/immigration control system substantially reproduces the new penology. Not only does it introduce new objectives, discourses and techniques into the regulation of immigration, but also it governs immigration matters through crime. Yet, when the potent and focused objective of uncovering, punishing and ultimately eliminating terrorism is added to the managerial, risk distributing function of the new penology, a different system of social control emerges. Within the hybrid system of crime/immigration control which I described earlier, the suppression of terrorism—a type of hyper-crime linked to foreigners—both draws upon and diverges from the New Penology within criminal punishment and immigration control practices.

The U.S. government initiated a threefold response to the terrorist attacks on September 11th. It mobilized crime-fighting tools to uncover and punish those who perpetrated and abetted the perpetrators of the attacks. Those tools included the criminal prosecutions of Zacariah Moussaui¹⁹⁷ and John Walker Lindh, (the so-called “American Al Qaeda”), the deputizing of state and local law enforcement officers to perform certain immigration law enforcement functions, and the monitoring of communications between inmates and other detainees in federal custody and their attorneys where such communications are suspected of being used to facilitate violence or terrorism. The government also mobilized a military response that included a military attack on the Taliban regime in Afghanistan (“Operation Enduring Freedom”), the detention of captured Al Qaeda members at the U.S. Naval Base at Guantanamo Bay, Cuba, military tribunals and the indefinite detention of “enemy combatants.” Lastly, the government mobilized immigration control tools that included beefing up security along US borders, requiring men from Arab and Muslim nations to register upon entering and leaving the U.S., extending the length of time for which a non-citizen may be detained by immigration authorities without a warrant, and limiting the ability of immigration judges to release immigration detainees in certain cases when immigration officials have opposed bond or set a high bond.¹⁹⁸

1. *Anti-terrorism initiatives reproduce the new penology and govern through crime*

Since 9/11, the war on terror has drawn upon and perpetuated many of the same managerial strategies and techniques used in recent anti-crime initiatives such as the war on drugs, and the crackdown on illegal and criminal aliens. First, it has relied heavily upon incapacitation as a means of increasing security and reducing risks to public safety. The preventive detention of nearly 1200 Muslim men and/or men of Arab descent immediately after

197. The so-called 20th terrorist.

198. See 78 INTERPRETER RELEASES 1708 (Nov. 5, 2001).

September 11th demonstrated that reliance, as does the continued detention of non-citizens in (even minor) violation of immigration law, and the continued detention of Al Qaeda suspects at Guantanamo Bay. Second, the war on terror has implemented zero-tolerance policies similar to those popularized by the war on drugs. Characteristic of the crackdown on illegal and criminal aliens, the War on Terrorism has also blurred the distinctions between criminal and immigration law enforcement by detaining and arresting terror suspects with tools from the arsenals of both systems, namely *material witness warrants* designed to compel testimony from frightened or reluctant witnesses in criminal proceedings,¹⁹⁹ and detention based upon *immigration violations* which INS officers are authorized to initiate when they have probable cause to believe an alien is in the U.S. in violation of the law.²⁰⁰ In addition, racial profiling—used in the warrantless apprehension of both disproportionately large numbers of African American and Hispanic drug crime suspects in traffic stops and of Mexican-looking workers in border area INS raids—has been popularly revived in the security screening of airplane passengers.

Terrorism has simultaneously been defined as an immigration problem,²⁰¹ a crime problem,²⁰² and a problem of national defense requiring military intervention.²⁰³ Anti-terrorism initiatives link the regulation of immigration, crime control and the authority of the military through the objective of protecting national security. The nature of the attacks of September 11th infused ordinary law enforcement with the heightened objective of protecting national security. Currently, national security pervades all aspects of the regulation of criminals and non-citizens through the hybrid crime-immigration control system that the two converging systems have created. The new objective of this system is to clean out a range of undesirable people, regardless of citizenship status, through criminally punitive means. National security also accomplishes this new objective of social sanitization more successfully than older, discredited devices because national security comes in below the constitutional radar screen (in much the same way as convict leasing as a form of criminal punishment functioned as a surrogate for slave labor after slavery was outlawed).

199. See 18 U.S.C. § 3144.

200. See 8 U.S.C. § 1357(a)(2).

201. The fact that the September 11th hijackers were out of status on student visas highlighted the vulnerability of the U.S. to terrorists who take advantage of the relatively lax enforcement of immigration compliance.

202. As early as 1988, the Bush Administration responded to the Lockerbie bombing in a legalistic fashion, eventually bringing to trial two Libyan suspects in the Netherlands. Subsequently, the Clinton Administration chose to deal with the bombing of the USS Cole in 2000 and the 1993 bombing of the World Trade Center as problems of law enforcement. The idea was that defining terrorism as criminal activity would “depoliticize” and “delegitimize” it. John Lancaster, *Compromising Positions*, WASH. POST, July 9, 2000, at W10 (quoting State Department Counterterrorism Chief, Michael A. Sheehan).

203. For example, military tribunals were established to deal with Al-Qaeda members captured in Afghanistan.

By elevating national security to the highest priority of the hybrid crime/immigration control system, anti-terrorism initiatives are governing through crime. First, the overlay of national security as the highest objective of the crime/immigration control system governs through crime by treating formerly distinct problems of law enforcement and foreign relations as unitary crime problems, and bringing military resources to bear on newly defined arenas of crime control and, conversely, bringing the traditional resources of crime control to bear on matters of international foreign relations. The most salient example since 9/11 is the linkage between international drug trafficking and terrorism—so called “narco-terrorism.” As a result of this linkage, informants for the Drug Enforcement Agency are providing intelligence on terrorist cells,²⁰⁴ the U.S. military is retraining its troops to fight small conflicts against borderless groups engaging in crime as they plan acts of terror,²⁰⁵ and the federal government undertook an expensive and unprecedented television ad campaign to get the message out that the casual use of illegal drugs supports terrorism.²⁰⁶ Other examples of the deployment of hybrid resources abound.²⁰⁷

Second, anti-terrorism initiatives govern through crime by justifying and renewing past, discredited practices within crime control and immigration regulation. For example, after decades of litigation challenging racial discrimination against Haitian immigrants in singling them out for detention while Cuban refugees are customarily granted parole, anti-terror policy has provided a new justification for detaining Haitian Refugees. The practice of automatically detaining Haitian refugees was largely discredited in the 1990’s due to the fact many Haitian refugees made out credible claims for asylum and international law disfavors the detention of asylum-seekers. But the imprisonment of Haitian boatpeople has re-emerged as a device for social ordering since the inception of the War on Terrorism.²⁰⁸ The newest justification offered by the federal government for the unequal use of indefinite detention against undocumented Haitian refugees who enter the U.S. by sea (when Cuban refugees are paroled into the country), is that national security requires such a harsh policy to “prevent the diversion of border enforcement efforts,”²⁰⁹ and to prevent the Coast Guard and other agencies from being distracted from their homeland defense role.²¹⁰ Now Haitian refugees find

204. James Dao, *The War on Terrorism Takes Aim at Crime*, N.Y. TIMES, Apr. 7, 2002, at 5.

205. *Id.*

206. *Id.*

207. Neighborhood crime watch groups are being encouraged by law enforcement agencies to be on the lookout for terrorist activity. Ryan Davis, *Crime Watch Meeting Shifts Focus to Terrorism*, ST. PETERSBURG TIMES, Mar. 29, 2002, at 4.

208. Donald Kerwin, *National Security and Immigrant Rights*, THE NATION, Dec. 19, 2002, available at <http://www.thenation.com/doc.mhtml?i=20030106&s=kerwin>.

209. Tanya Weinberg, *Activists Press for Policy Shift; U.S. Urged to Ease Detention for Haiti Refugees*, S. FLORIDA SUN-SENTINEL, Nov. 27, 2002, at 3B.

210. Madeline Baro Diaz, *Influx of Refugees Seen as a Tax on Social Services*, S. FLORIDA SUN-SENTINEL, Nov. 9, 2002, at 14A.

themselves being imprisoned again, this time under a “national security”-based logic that has been characterized by critics as “strained.”²¹¹

Another example is the renewal of racial profiling as a law enforcement practice. Racial profiling emerged as a high-profile issue of law enforcement practice in the early 1980’s when it was routinely employed in the War on Drugs. Racial profiling has been defined as “the practice of stopping and inspecting people who are passing through public places – such as drivers on public highways or pedestrians in airports or urban areas – where the reason for the stop is a statistical profile of the detainee’s race or ethnicity.”²¹² It has been challenged extensively by minority groups, African Americans and Latinos in particular, who police routinely profile as drug users and traffickers. Until September 11th, 2001, the practice of racial profiling had been largely discredited. Presidential candidate George W. Bush even pledged to do away with the practice as a campaign promise.²¹³ Many law enforcement agencies revised their policies to narrowly curtail or eliminate the practice.

As the War on Terrorism governs through crime, it simultaneously accomplishes the objective of removing a wide range of socially undesirable people, regardless of citizenship status, through criminally punitive means. And it has been able to transcend the limitation on the immigration system to control only the expulsion of non-citizens. For example, record numbers of legal immigrants are fleeing the country in fear of being incarcerated and deported for minor, technical violations of immigration regulations. This has largely occurred after the initiation of Special Registration²¹⁴ pursuant to the USA PATRIOT Act, designed to track the whereabouts of Muslim and Arab men as they enter and leave the United States.

2. *Anti-terrorism initiatives reconfigure the new penology*

Terrorism as we view it today—loosely defined as a violent attack by a semi-clandestine organization, the goal of which is to intimidate a government or civil population in furtherance of political or social objectives—was not historically treated as a crime. Therefore, the entire post-Enlightenment transformation of the penal system into a process led by the rehabilitative ideal that constitutes the historical landscape for a later series of shifts in penal practices that began in the mid-1970’s and through which the new penology emerged are less relevant to terrorism. As a crime, there is not even

211. Donald Kerwin, *supra* note 208.

212. Gene Callahan & William Anderson, *The Roots of Racial Profiling*, REASONONLINE, Aug.-Sept. 2001, available at <http://www.reason.com/0108/fe.gc.the.shtml>.

213. In his February address to Congress, President George W. Bush reported that he had asked Attorney General John Ashcroft “to develop specific recommendations to end racial profiling. It’s wrong, and we will end it in America.” *Id.*

214. Under the Special Registration provisions of the USA PATRIOT Act, all males 16 and older from 25 countries (24 of which are predominantly Islamic) who are present within the United States must register with the immigration service or risk being locked up and eventually deported from the United States. See 8 U.S.C. § 1302 *et seq.* (2003).

international consensus on what constitutes terrorism. Terrorism has been defined simultaneously as a domestic crime, an international crime, a war crime²¹⁵ and a crime against humanity. Hardly the stuff of managing low level drug offenders through risk distributing punishments that exploded the prison population and prompted, in part, Feeley and Simon's initial inquiry into changing penal objectives, technique and strategies.²¹⁶

The war on terrorism is a highly focused campaign being waged with tools from the arsenals of immigration control, crime control and national defense (the military). Initiatives undertaken to combat terrorism are a product of a very deliberate response to acts of terrorist violence that have occurred in, or against, the United States, including the bombing of the World Trade Center in 1993, the bombing of the USS Cole in 2000 and the attacks on the World Trade Center and the Pentagon in September 2001.

In contrast, the new penology is a model of a new system of social control that is not reducible to any single reigning ideology²¹⁷ or set of principles. The new penology seeks to manage risk rather than to eliminate it. However, when one combines the new techniques, discourses and objectives of the new penology with the highly focused objective of eliminating terrorism, the new penology ceases to be managerial, and is transformed into a very different system of social control. One way of understanding the impact of anti-terrorism and its national security imperative on the new penology is to observe how concerns about terrorism have transformed the policing of minority communities, the investigation of domestic crime and the treatment of penal subjects.

Prior to 9/11, international terrorism (terrorism masterminded by foreigners), domestic terrorism (such as the acts of Timothy McVeigh and groups like the Michigan Militia) and domestic crime were fairly distinct categories. Law enforcement approached the threats posed by Al-Qaeda, the Michigan Militia and street criminals very differently. After 9/11, immigration was used as an important vehicle for controlling international terrorism principally because the people who hijacked airplanes and used them as missiles were Saudis under the direction of Osama bin Laden admitted into the United States through our immigration agency. Controlling immigration was thought to be the most important strategy for preventing terrorism. Indeed the preventive detention that took place in the weeks following 9/11 concentrated on taking into custody Arab nationals residing in the U.S.²¹⁸ Large Arab immigrant communities within major U.S. cities were targeted. The reduced rights enjoyed by non-U.S. citizens permitted the INS to detain these

215. The United Nations has accepted the definition of "terrorism" as a "peacetime war crime".

216. Feeley & Simon, *supra* note 158, at 4.

217. *Id.*

218. Dante Chinni, *Wide FBI Dragnet Turns up Leads, but also Criticism*, CHRISTIAN SCI. MONITOR, Oct. 15, 2001 at 2.

individuals in secrecy, without notice and without publishing their names.²¹⁹ Not until the FBI tied six Americans living in Lackawanna, NY to the Al Farooq training camp in Afghanistan did the focus on terrorism shift to US citizens.²²⁰ African Americans—the usual suspects in the domestic policing of crime—breathed a sigh of relief that the manhunt was focused on brown-skinned people with *straight* black hair. Frequent victims of racial profiling for domestic crime and overrepresented in the prison population, they were relieved that investigating terrorism would not be added to the inventory of excuses law enforcement authorities employ to legitimate racial harassment. Just as the U.S. became accustomed to the menacing mugshot-like images of brown-skinned, black-haired young men of clearly Middle Eastern descent plastered on the front pages of the papers, the paradigm suddenly shifted. The FBI uncovered an alleged terrorist cell in Portland, Oregon that included three Black Muslims.²²¹ The brown-skinned, kinky-haired mugshots of Jeffrey Leon Battle, his ex-wife October Martinique and Patrice Lumumba Ford were plastered on the front-page of the New York Times alongside several other suspects of Arab descent. Investigating international terrorism immediately became synonymous with tracking the activities of radical Black Muslims.

The link between minority communities in the United States and the investigation of international terrorism is more obvious when we consider the institution in which radical Black Islam flourished 30 years ago, and where even today, many African Americans find Allah—prison. Prisons, and the many African Americans incarcerated in them, are now inextricably caught up in the crime/terror continuum of social control. The prison unrest that gave rise to the Prisoners' Rights Movement was in large part activated by Black Panthers and other black radicals arrested and incarcerated for violent opposition to racial subordination. Indeed, in 1969, J. Edgar Hoover publicly stated that the Panthers are the “ ‘greatest threat to the internal security of the country.’ ”²²² Now our greatest threat is terrorism. And because prisoners have far fewer rights than the non-convicted, it is far easier to subject them to surveillance, etc. The apprehension of Jose Padillo, alleged to have plotted to detonate a “dirty bomb” and Richard C. Reid, the “Shoe Bomber” alleged to have attempted to blow up a plane on its way from Paris to Antigua (via Miami) last year, further attests to the link between communities of color and the investigation of international terrorism. Padillo, a U.S. citizen of Puerto Rican ethnicity, also converted to Islam while incarcerated. Reid, a

219. Deborah Barfield, *America's Ordeal; Critics Wary of Bid to Curtail Rights*, NEWSDAY, Oct. 2, 2001, at A4.

220. John Kifner & Marc Santora, *Threats and Responses: Suspects; F.B.I. Makes 6th Arrest in Buffalo Inquiry*, N. Y. TIMES, Sept. 16, 2002, at A12.

221. Chisun Lee, *A Smaller Stick*, VILLAGE VOICE, Sept. 24, 2002, at 22.

222. Salim Muwakkil, *Black Panthers Reconsidered*, CHI. TRIB., Feb. 28, 2000, at 11.

British citizen whose father is a black Jamaican, converted to Islam in prison as well.

Now, domestic crime is being scrutinized closely for links to terrorism. Immigration plays an important role in that scrutiny. For example, when John Mohammed and John Malvo were arrested for arguably the most atypical serial killing spree ever profiled, the media seized onto the fact that Malvo was released from INS custody after he was discovered to have no documentation that he was legally in the country. Media pundits criticized the INS and the porosity of our borders as it did in the wake of 9/11 when the agency renewed the visas of some of the hijackers. Furthermore, law enforcement officials questioned immigration officials in Antigua to determine whether Mohammed and Malvo had ties to "shoe bomber" Richard Reid by virtue of the fact that they resided on the island for a common period of time.²²³

The probable consequences of the link between international terrorism and domestic crime are manifold. First, national security will be increasingly employed as a justification for surveillance and detention of poor urban communities of color.

Second, prisons will become sites for obtaining intelligence on terrorism, and increasingly national security will regulate the practice of Islam in prisons rather than "legitimate penological objectives."

Traditionally, religious practices in prison are governed by constitutional law. Although the standard for review of impingements on religious practices by prisoners has varied in the past twenty years, the current standard of review is the "rational basis" test. Restrictions that bear some reasonable relation to legitimate penological objectives pass constitutional scrutiny. Although an admittedly low standard of review, it is possible to imagine a national security based standard that eviscerates the constitutional standard altogether. This lower standard would subject Black Muslim prisoners to greater surveillance and discipline and be a perfect tool for investigating criminal and disciplinary infractions committed in prison.

VII. CONCLUSION

The past two decades have witnessed profound shifts in the U.S. immigration law and policy. As public tolerance for illegal immigrants and refugees waned, immigration law became even more harsh and criminally punitive. This paper links criminally punitive immigration reforms enacted over the past two decades to new strategic formations within immigration law that are consistent with the new penology. In demonstrating how these harsh, punitive new reforms reproduce the new penology, I contend that a new hybrid crime/immigration system of social control has formed that reconfigures both the crime and immigration control systems by "criminalizing"

223. Allan Lengel, *Sniper Rifle Was Also Used In Ala. Killing*, WASH. POST, Oct. 31, 2002, at A1.

immigration law, and making the criminal law—like immigration law—more administrative and less judicially reviewable. Ultimately, this hybrid crime/immigration control system has the potential, when combined with the highly focused political objective of eliminating the threat of terrorism, to dramatically impact the nature of penal supervision and spawn a potent, new system of social control premised upon protecting national security.